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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 666

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Indictment	5
Instructions Requested by Petitioner	5
Statement of Case	6
Reasons for Granting the Writ	9
Argument	13
1. May the conviction of Petitioners of conspiracy between themselves alone under 18 U. S. C., Section 371, to violate 18 U. S. C., Section 242, be sustained when, as here, both Petitioners are private citizens legally incapable of acting under color of law in violation of 18 U. S. C., Section 242?	13
2. May a conviction of private persons under 18 U. S. C., Section 371, to violate 18 U. S. C., Section 242, be sustained when it was conclusively established that there was a total absence of state action	19
2 (a). Did the Court err in refusing Instruction No. 20 offered by Petitioners?	19
3. May 18 U. S. C., Section 2, be applied to 18 U. S. C., Section 371, to sustain a conviction of Petitioners as private persons convicted under Section 371 to violate Section 242, where no person acting wilfully under color of law and capable of violating Section 242 conspired with those convicted,	

and where upon Count Two of the same indictment the jury's verdict of not guilty conclusively established that there was no violation of Section 242 or Section 2? 30

3 (a). Function of 18 U. S. C., Section 2 (a) (b) .. 30

3 (b). In every criminal offense must there be a principal capable of committing the offense? 30

4. Did the Court err in not instructing the jury that to convict Petitioners it was not sufficient that Petitioners had a generally bad purpose, but that to convict it was necessary for the jury to find that Petitioners had the specific intent and purpose to wilfully deprive Ratterman of rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States 51

Conclusion 55

Appendix 57

Indictment 57

Opinion 59

Cases Cited.

Banks v. United States, 239 F. 2d 409 .....10, 50

Barron v. United States (1st), 5 F. 2d 799 .....10, 18

Brown v. United States (6th), 1953, 204 F. 2d 247 .....10, 14, 18

Carter v. United States (8th), 1927, 19 F. 2d 431..10, 14, 19

Chadwick v. United States (6th), 1905, 141 F. 225 .....10, 14, 18

Coffin v. United States (1896), 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109 .....10, 46, 47, 50

Cohen v. United States (9th), 1944, 144 F. 2d 984 .....10, 13, 19

Colosacco v. United States (10th), 1952, 196 F. 2d 165, 167 .....10, 42, 50

Culp v. United States (8th), 1942, 131 F. 2d 93 ..10, 14, 18
Curtis v. United States (10th), 1933, 67 F. 2d 943 .....10, 14, 19

Downs v. United States (3rd), 1925, 3 F. 2d 855..10, 13, 18

Gebardi v. United States, 1932, 287 U. S. 112, 77 L. Ed. 206, 52 S. Ct. 648 .....9, 17, 18, 19
Giragosian v. United States (1st), 1965, 349 F. 2d 166 .....10, 45, 50
Grimsley v. United States (5th), 1931, 50 F. 2d 509, 511 35

Hernandez v. United States (9th), 1962, 300 F. 2d 114, 123-124 .....10, 42, 50
Hoffman v. Halden (1959), 268 F. 2d 280 .....34, 35

Johnson v. United States (5th), 1907, 158 F. 69 .....10, 13, 18, 50
Jollit v. United States (5th), 1923, 285 F. 209, 213 ... 13

Kaufman v. United States (2nd), 212 F. 613 .....10, 18
King v. United States (5th), July 29, 1966, Case No. 23,637 (not yet reported) 10, 41, 50
Koehler v. United States, 189 F. 2d 711 .....10, 18

Nye & Nisson v. United States, 1949, 336 U. S. 613, 619 33

Parr v. United States, 1960, 363 U. S. 370, 4 L. Ed. (2) 1277, 80 S. Ct. 1171 .....10, 49, 50
Pereria v. United States, 1954, 347 U. S. 1, 74 S. Ct. 358, at p. 445 of 98 L. Ed. 31, 34, 41
Pinkerton v. United States, 1945, 238 U. S. 640, at p. 1497 of 90 L. Ed. 34
Pullen v. United States, 1947, 164 F. 2d 756 .....51, 55

Regina v. Saunders, 1575, 2 Plowd. 473 .....38, 39, 40
Remus v. United States (6th), 1923, 291 F. 513 ....33, 34
Rex v. Owen, 1752, 18 Howell, State Trials 1203 26

Scott v. United States (6th), 1904, 130 F. 429 ...10, 14, 18

Screws v. United States, 1944, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330 .....9, 12, 51, 55
Shuttlesworth v. Birmingham, 373 U. S. 262, 10 L. Ed. (2) 335, 83 S. Ct. 11 .....10, 48, 49, 50

United States v. Baer (1876—Minn.), 24 Fed. Cas. 1046, Fed. Case 14,547 14
United States v. Aaron Burr, 1807, 25 Fed. Cas. 177-178, Case No. 14,693, 2 L. Ed. 700, 701 36
United States v. Gooding, 25 U. S. 460, 12 Wheat. 460 .....9, 38, 40, 47, 50
United States v. Guest, March 28, 1966, 383 U. S. 745, 16 L. Ed. (2) 239, 86 S. Ct. 1170....9, 10, 20, 22, 27, 28, 30
United States v. Hoffa, 1965, 349 F. 2d 20.....10, 47, 50
United States v. Inciso, 292 F. 2d 374 41
United States v. Johnson (U. S. D. C., D. Md.), 1963, 215 F. Supp. 300 44
United States v. Lynch, 1950, 94 F. Supp. 1011 17
United States v. Martin, 26 Fed. Cas. 1175, Case No. 15728 13
United States v. Mills, 1833, 7 Pet. 138, 8 L. Ed. 636 .....9, 35, 40, 44, 47, 50
United States v. Pihakis (3rd), 1955, 224 F. 2d 898..10, 50
United States v. Price, March 28, 1966, 383 U. S. 787, 16 L. Ed. (2) 267, 86 S. Ct. 1152.....9, 10, 20, 25, 30
United States v. Pyle (S. D. Cal., S. D.), 1921, 279 F. 290 46
United States v. Selph, 82 F. Supp. 56 41
United States v. Snyder, 14 F. 554.....38, 39, 40
United States v. Tornabene (3rd), 222 F. 2d 875 .....10, 42, 45, 46, 50
United States v. Trierweiler (D. C. Ind.), 1943, 52 F. Supp. 4, 5 .....16, 17

Von Patzoll v. United States (10th), 1947, 163 F. 2d 216, 219 .....10, 41, 50

Williams v. United States (1951), 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774 .....9, 12

Constitutional Provisions and Statutes Cited.

XIV Amendment to the Constitution of the United States, § 1 ..... 4, 20, 24, 51
18 U. S. C., § 2 (a) (b) 3, 11, 30, 31, 32, 33, 38, 41, 42, 48, 49
18 U. S. C., § 241 22
18 U. S. C., § 242 ..... 2, 3, 4, 6, 11, 12, 13, 14, 18, 19, 29, 30, 38
18 U. S. C., § 371 ..... 2, 3, 4, 6, 11, 12, 13, 14, 19, 29, 30, 49
18 U. S. C., § 656 ..... 38, 42
Title 28, U. S. C., § 1254 (1) 2

IN THE

SUPREME COURT OF THE UNITED STATES.

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No. .....

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Charles E. Lester and Edward Anthony Buccieri pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-styled case on July 8, 1966.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 363 F. (2) 68, and appears at page 59 of the Appendix to this Petition.

JURISDICTION.

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 8, 1966. The Order of the Court of Appeals denying the Petition for Re-hearing was entered September 15, 1966. An Order staying the mandate of the Court of Appeals thirty days was entered September 21, 1966.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

In this case Petitioners were charged in Count One of the indictment to have conspired with others, including three police officers, under 18 U. S. C., Section 371 to violate 18 U. S. C., Section 242. Petitioners, both of whom were and are private citizens legally incapable of violating 18 U. S. C., Section 242, were found guilty. All others, including the police officers so accused, were found not guilty by the jury.

By Count Two of the indictment Petitioners, together with another private citizen and the three police officers, were accused of violation of 18 U. S. C., Sections 242 and 2. Petitioners and all so accused were upon this count found not guilty by the jury.

This case, therefore, presents the following questions:

1. May the conviction of Petitioners of conspiracy between themselves alone under 18 U. S. C., Section 371 to violate 18 U. S. C., Section 242 be sustained when, as here, both Petitioners are private citizens legally incapable of acting under color of law in violation of 18 U. S. C., Section 242?

2. May a conviction of private persons under 18 U. S. C., Section 371 to violate 18 U. S. C., Section 242 be

sustained when it was conclusively established that there was a total absence of state action?

3. Did the Court err in refusing Instruction No. 20 offered by Petitioners?

4. May 18 U. S. C., Section 2 be applied to 18 U. S. C., Section 371 to sustain a conviction of Petitioners as private persons convicted under Section 371 to violate Section 242, where no person acting wilfully under color of law and capable of violating Section 242 conspired with those convicted, and where upon Count Two of the same indictment the jury's verdict of not guilty conclusively established that there was no violation of Section 242 or Section 2?

5. In every criminal offense must there be a principal capable of committing the offense?

6. Did the Court err in not instructing the jury that to convict Petitioners it was not sufficient that Petitioners had a generally bad purpose, but that to convict it was necessary for the jury to find that Petitioners had the specific intent and purpose to wilfully deprive Ratterman of rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

18 U. S. C., § 2.

Principals.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever wilfully causes an act to be done, which if directly performed by him or another, would be an

offense against the United States, is also a principal and punishable as such.

18 U. S. C., § 242.

Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U. S. C., § 371.

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

XIV Amendment to the Constitution of the United States, Section 1.

Sec. 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INDICTMENT.

The two-count indictment returned by the Federal Grand Jury October 27, 1961, is set forth in the Appendix to this Petition at pages 57, 58.

INSTRUCTIONS REQUESTED BY PETITIONERS.

The instruction requested by the Petitioners and refused by the Court appears at Appellants' Appendix 262a and is in this language:

> Unless you find from the evidence that one or more of the defendants, Ciafardini, White and Quitter, were acting under color of law and guilty of the alleged charges in Count 1 and Count 2 of the indictment, then the law is for the defendant, Charles E. Lester, and you so shall find; and further, should you believe from the evidence that one or more of the officers, Ciafardini, White and Quitter, guilty of the charges alleged in Count 1 and Count 2 of the indictment, the jury must further believe from the evidence that said Charles E. Lester entered into a conspiracy with said officers or aided or abetted said officers to commit the offenses so charged in Count 1 and Count 2, otherwise the law is for the defendant, Charles E. Lester, and you shall find him not guilty on Count 1 and Count 2 of the indictment.

STATEMENT OF CASE.

Petitioners, Charles E. Lester and Edward Anthony Buccieri, were convicted upon a jury verdict finding them guilty, in count one of an indictment, which alleged that petitioners and another private citizen, one Carinci, conspired together and with three members of the police force of Newport, Kentucky, to commit an offense against the laws of the United States, in violation of 18 U. S. C., § 371.

The offense averred to be the object of this conspiracy was to violate 18 U. S. C., § 242, in that the police officers would, while acting in their official capacity, willfully deprive one George W. Ratterman, under color of state law, "of rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States; namely, the right not to be deprived of liberty without due process of law, the right to be free from arrest by an officer acting arbitrarily and without legal justification or cause, and the right not to be denied the equal protection of the law." It is further alleged in the indictment that: "It was the plan and purpose of the conspiracy that (the three defendant police officers) . . ., while acting . . . under color of law, would arrest and imprison George W. Ratterman, charge him with a violation of law, and cause his conviction, all knowing him to be innocent."

In count two of the indictment, the police officers were accused of the commission of the substantive offense which was the asserted object of the conspiracy; while petitioners and Carinci were charged with aiding and abetting the police officers in their violation of 18 U. S. C., § 242. The jury convicted both petitioners of the conspiracy charged in count one, but acquitted them of the substantive offense charged in count two. All other de-

fendants, including the three police officers, were acquitted by jury verdict of all charges—both the conspiracy and the substantive offense.

Additional facts stated by the Court in its majority opinion are:

The evidence, direct and circumstantial, in the case at bar, together with the inferences which the jury could reasonably have drawn therefrom, combined to warrant the jury in finding *inter alia* the following facts: The Glenn-Tropicana, a combination nightclub and hotel in Newport, Kentucky, across the Ohio River from Cincinnati, had been favored for many years with somewhat-less-than-vigorous enforcement of the State laws prohibiting gambling and prostitution. In April of 1961, upon the announcement of George W. Ratterman as a "reform" candidate for sheriff, defendant Carinci, a co-proprietor of the Glenn-Tropicana, telephoned one Thomas Paisley and asked him to arrange a meeting for Carinci with Ratterman.

A few days later, on April 14, petitioner Lester, attorney for the Glenn-Tropicana, telephoned a Newport photographer and asked him to talk to petitioner Buccieri, another co-proprietor of the Glenn-Tropicana, about a picture. In due course, the photographer contacted Buccieri who told the photographer that his services would be needed "to take a picture of a man and a woman in a room"; and added the assurance: "Now, don't worry about anything, we will protect you." The photographer gave Buccieri a telephone number where he could be reached at night.

On May 8, 1961, Paisley came to Cincinnati and had cocktails and dinner with Ratterman, commencing at about 5:45 in the afternoon, following which they met with Carinci at a Cincinnati restaurant. After consuming

several drinks in the course of the evening, Ratterman and Carinci and Paisley went over to the Glenn-Tropicana for supper. Upon their arrival about 1:30 A. M., Ratterman and Paisley were ushered into Glenn-Tropicana's suite 314 on the third floor near which an illegal gambling operation was regularly conducted. Petitioner Buccieri then sent Rita Desmond, one of the club's showgirls, upstairs to suite 314 to have a drink with Paisley and Ratterman. Shortly after Rita arrived, Ratterman, who was extremely drowsy by now, left the sitting room of the suite and lay down in an adjoining bedroom.

Carinci next directed April Flowers, another of the Glenn-Tropicana's showgirls, to stop her striptease act and go at once to suite 314 without bothering to change her costume. When April arrived, she was asked by Rita to go into the bedroom and try to awaken Ratterman. April did so, but her efforts failed to arouse Ratterman. Carinci then came to suite 314 and requested Rita and Paisley to go elsewhere in the club with him, leaving April and Ratterman alone in the bedroom of 314.

Meanwhile, approximately ten minutes after Ratterman had arrived at the Glenn-Tropicana, someone called the photographer's home, and left word for him to call Buccieri at the club. However, the photographer did not return the call. At 2:20 A. M., the gambling operations on the third floor were closed substantially earlier than usual, and the patrons were asked to leave the third floor.

At 2:32 A. M., an anonymous phone call was received at the Newport police station for one of the defendant police officers, who was told: "If you want to get George Ratterman, he is in Room 314 of the Glenn Hotel." The three defendant officers thereupon went to the Glenn-Tropicana at 2:35 A. M., where they first arrested Carinci, and then April Flowers as she emerged from the bedroom of suite 314. That done, there followed a brief scuffle

between the police officers and Ratterman, and the latter was taken into custody, wrapped in a bedspread. Testimony by the police officers that he was found with his trousers off was disputed by Ratterman, who said that his trousers had been removed from him by the officers.

Petitioner Lester promptly arrived at the police station, after having called a bondsman who posted bail for April Flowers and Carinci, but refused to provide bail for Ratterman. Petitioner Lester admitted that he had been up since 2:00 A. M., "when the Ratterman deal broke" —well more than a half hour before the arrests occurred. At approximately 4:00 A. M. following the arrests, all six persons accused in the indictment—including the three police officers—were seen together at the Glenn-Tropicana, and at the Flamingo Club an hour later.

Examination of Ratterman the following day disclosed traces of from three to four grams of chloral hydrate ["knockout drops"] estimated to have been ingested between 10:00 and 11:00 P. M. the previous evening.

REASONS FOR GRANTING THE WRIT.

Petitioners say this Petition for Writ of Certiorari should be granted because:

1. The decision of the Court of Appeals is in conflict with the decisions of this Court in United States v. Guest, March 28, 1966, 383 U. S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170; United States v. Price, March 28, 1966, 383 U. S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152; Screws v. United States, 1944, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 ALR 1330; Williams v. United States, 1951, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774; Gebardi v. United States, 1932, 287 U. S. 112, 53 S. Ct. 35, 77 L. Ed. 206; United States v. Gooding, 1827, 25 U. S. 460, 12 Wheat. 460; United States v. Mills, 1833, 7 Pet. 138, 8 L. Ed. 636;

Shuttlesworth v. Birmingham, 1963, 373 U. S. 262, 10 L. Ed. 2d 335, 83 S. Ct. 1130; Parr v. United States, 1960, 363 U. S. 370, 4 L. Ed. 2d 1277, 80 S. Ct. 1171; and Coffin v. United States, 1896, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109. (See O'Hara v. Mattix (June 27, 1966), 255 F. Supp. 540 for the understanding by the United States District Court for the Western District of Michigan of the teaching of the **Guest** and **Price** cases.)

2. The decision of the Court of Appeals is in conflict with Barron v. United States, First Circuit, 5 F. 2d 799; Giragosian v. United States, 1965, First Circuit, 349 F. 2d 166; Kaufman v. United States, Second Circuit, 212 F. 613; Downs v. United States, Third Circuit, 1925, 3 F. 2d 855; United States v. Tornabene, Third Circuit, 222 F. 2d 875; United States v. Pihakis, 1955, Third Circuit, 224 F. 2d 898; Johnson v. United States, Fifth Circuit, 1907, 158 F. 69; King v. United States, July 1966, Fifth Circuit, Case No. 23637, not yet reported; Koehler v. United States, 5th Circuit, 189 F. 2d 711, see Supreme Court Koehler v. United States, 1951, 342 U. S. 852, 72 S. Ct. 75, 96 L. Ed. 643; Brown v. United States, Sixth Circuit, 1953, 204 F. 2d 247; Chadwick v. United States, Sixth Circuit, 1905, 141 F. 225; Scott v. United States, Sixth Circuit, 1904, 130 F. 429; United States v. Hoffa, 1965, Sixth Circuit, 349 F. 2d 20; Banks v. United States, 1957, Seventh Circuit, 239 F. 2d 409; Carter v. United States, Eighth Circuit, 1927, 19 F. 2d 431; Culp v. United States, Eighth Circuit, 1942, 131 F. 2d 93; Cohen v. United States, Ninth Circuit, 1944, 144 F. 2d 984; Hernandez v. United States, 1962, Ninth Circuit, 300 F. 2d 114; Curtis v. United States, Tenth Circuit, 1933, 67 F. 2d 943; Von Patzoll v. United States, 1947, Tenth Circuit, 163 F. 2d 216; and Colosacco v. United States, 1952, Tenth Circuit, 196 F. 2d 165, all holding that at least one of alleged conspirators must possess capacity to commit the substantive offense or that in a prosecution for aiding and

abetting it must be alleged and proven that the offense had in fact been committed.

3. The decision of the Court of Appeals in applying 18 U. S. C., § 2 to sustain a conviction of conspiracy under § 371 to violate § 242 is constitutionally impermissible where, as here, the jury verdicts conclusively established no violation of § 242 and § 2 and conclusively established that Petitioners did not conspire with any person (the police defendants) capable of acting wilfully and under color of law.

4. The decision of the Court of Appeals by applying 18 U. S. C., § 2 and 18 U. S. C., § 371 to sustain a conviction of Petitioners of conspiracy to violate § 242 abrogates the essential element in every criminal offense that there must be a principal capable of committing the offense. The police were acquitted on both counts of the indictment. If the decision of the Court of Appeals is not reversed petitioners stand convicted as aiders, abettors, or of causing the commission of a crime which has not been committed.

5. 18 U. S. C., § 2 is not applicable to sustain a conviction of a 18 U. S. C., § 371 conspiracy to violate § 242 in that aiding, abetting, or causing one to commit an offense against the United States does not presuppose the existence of an agreement, which is the gist of a conspiracy, and especially as here, where the police officers who were the only defendants capable of violating § 242 were found not guilty of conspiracy with Petitioners and not guilty of the commission of the substantive offense.

6. The effect of the decision of the Court of Appeals of applying 18 U. S. C., § 2 to 18 U. S. C., § 371 to violate § 242 to sustain Petitioners' conviction as private citizens of conspiring with themselves alone to violate § 242 would bring within the statute crimes done by men in general in the ambit of their personal pursuits and as so applied is constitutionally impermissible.

7. The effect of the majority opinion of the Court of Appeals in sustaining the conviction of Petitioners for a § 371 conspiracy to violate § 242 without a co-conspirator capable of violating § 242 has eliminated the essential elements required to violate § 242; that is, willful state action under color of law.

8. The refusal of the District Court to give Petitioners' offered Instruction No. 20 denied to Petitioners their constitutional right that the government must prove beyond a reasonable doubt that the police officers acted wilfully and under color of law and conspired with Petitioners to violate § 242. The verdicts acquitting the police of conspiracy with Petitioners and acquitting the police of the substantive offense denies the existence of the essential facts; that is, state action by participation of the police in the alleged conspiracy.

9. The failure of the trial court to instruct the jury "that to convict petitioners it was not sufficient that petitioners had a generally bad purpose, but that to convict it was necessary for the jury to find that petitioners had the specific intent and purpose to wilfully deprive Ratterman of rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States" denied to petitioners their constitutional right to have the government prove such specific intent as required by the decision of this Court in Screws v. United States, 1944, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 ALR 1330, and Williams v. United States, 1951, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774.

ARGUMENT.

1. May the Conviction of Petitioners of Conspiracy Between Themselves Alone Under 18 U. S. C., Section 371 to Violate 18 U. S. C., Section 242 Be Sustained When, as Here, Both Petitioners Are Private Citizens Legally Incapable of Acting Under Color of Law in Violation of 18 U. S. C., Section 242?

It is conclusively established by the record of the case at Bar that each Petitioner was a private citizen incapable of acting under color of law. The jury convicted Petitioners of a conspiracy between themselves alone under 18 U. S. C., § 371 to violate 18 U. S. C., § 242 and acquitted the police officers who were the only defendants capable of violating § 242.

It seems appropriate here to restate the law as it appears in an unbroken line of authorities in respect to what is now 18 U. S. C., § 371 as applied to the case at Bar where neither Petitioner acting alone or in concert with the other are or were capable of violating 18 U. S. C., § 242. So long ago as 1870, just three years after the passage of the Federal conspiracy statute, Act of 1867, C. 169, Section 20, before which the crime denounced was unknown to Federal law, it was held in United States v. Martin, 26 Fed. Cas. 1175, Case No. 15,728, that the fact that one of the conspirators could not commit the intended offense neither relieves him of guilt nor disables him from conspiring with another person who is able to commit it.

A few of the many cases which sustained the foregoing statement are Cohen v. U. S. (1944—9th), 144 F. 2d 984, involving a private citizen and an officer of the selective service system; Downs v. U. S. (1925—3rd), 3 F. 2d 855, a civilian and a prohibition agent; Johnson v. U. S. (1907—5th), 158 F. 69, 72, a bankrupt and another; Jollit

v. U. S. (1923—5th), 285 F. 209, 213, a bankrupt and another; Curtis v. U. S. (1933—10th), 67 F. 2d 943, 946, a bank officer and another; U. S. v. Bayer (1876—Minn.), 24 Fed. Cas. 1046, Fed. Case No. 14,547, a conspiracy between a bankrupt and another; Carter v. U. S. (1927—8th), 19 F. 2d 431, a bankrupt and another; and Culp v. U. S. (1942—8th), 131 F. 2d 93, 99, which was an indictment under what is now, as at bar, 18 U. S. C., § 371, to violate 18 U. S. C., § 242. In **Culp**, speaking of one of the defendants, Jim Miller, a private citizen, the Court at p. 99 of the opinion said:

> "* * * That Jim Miller was not, and was not alleged to be, a state officer would not affect the validity of the indictment, since the fact that he could not commit the offense which was the alleged object of the conspiracy **would not prevent him from agreeing with those who could commit it that the offense should be committed** * * *" (Our emphasis).

This principle of law has been uniformly followed down through the years. The case of Brown v. United States (6th) 1953, 204 F. 2d 247, followed the principle previously established by this same Sixth Circuit that to sustain a conviction for conspiracy to violate 18 U. S. C., § 242 it is necessary that at least one of the co-conspirators possess the capacity to commit the offense denounced by § 242. In **Brown** the Sixth Circuit based its holding upon previous cases there decided, Chadwick v. United States, Sixth Circuit, 1905, 141 F. 225 and an earlier case so decided by the same Circuit, Scott v. United States, Sixth Circuit, 1904, 130 F. 429. That portion of the **Brown** opinion applicable to the case at Bar is as follows as it appears at 204 F. 2d 250:

> "A state law enforcement officer who, under color of state law, willfully and without cause arrests and imprisons an inhabitant of the United States for the purpose of extortion deprives him of a right, privi-

lege and immunity secured and protected by the Constitution of the United States and commits an offense defined under 18 U. S. C., § 242. An agreement between state law enforcement officers and others to engage in such extortion under color of state law is a conspiracy to violate § 242 under 18 U. S. C., § 371, Culp v. United States, 8 Cir., 131 F. 2d 93, 98.

The evidence established and the jury found that appellant was the prime mover in this system of extortion. It was carried on at his direction, for his benefit, and for a considerable period of time. The fact that appellant was a private citizen and legally incapable of violating § 242 does not render him immune from a charge of violating 18 U. S. C., § 371 by engaging in an agreement with a law enforcement officer acting under color of state law to violate 18 U. S. C., § 242. United States v. Holte, 236 U. S. 140, 145, 35 S. Ct. 271, 59 L. Ed. 504. As declared in Chadwick v. United States, 6 Cir., 141 F. 225, at page 237, opinion by Judge Lurton: 'It is sufficient if any one of the parties to a conspiracy is legally capable of committing the offense, although the other parties may not have been.' As was stated in United States v. Trierweiler, D. C., 52 F. Supp. 4, at page 7:

"'It is immaterial that they themselves may not have had the capacity to violate the statute for they became liable criminally *if they conspired to violate that statute and if one or more of their fellow conspirators had the capacity to commit the substantive offense.*' Barron v. United States, 1 Cir., 5 F. 2d 799, 801, 802; Haggerty v. United States, 7 Cir., 5 F. 2d 224, 225; Kaufman v. United States, 2 Cir., 212 F. 613, 618 (Our italics).

"In accord with this conclusion are Koehler v. United States, 5 Cir., 189 F. 2d 711; Apodaca v. United States, 10 Cir., 188 F. 2d 932.

"The presence of Colagross, who was a state officer, and his active cooperation with appellant furnished the color of law or 'pretense' of law, Screws v. United States, supra, 325 U. S. at page 111, 65 S. Ct. at page 1040, required as to appellant. United States v. Lynch, D. C., 94 F. Supp. 1011, affirmed, 5 Cir., 189 F. 2d 476, certiorari denied, 342 U. S. 831, 72 S. Ct. 50, 96 L. Ed. 629. Cf. Williams v. United States, 5 Cir., 179 F. 2d 656, 661, affirmed 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774."

The principal distinction between the **Brown** case and the case at Bar is that Brown's co-defendant was a Tennessee Deputy Sheriff who was convicted as a co-conspirator and who possessed the power and authority of a Sheriff and who acted under color of his office. Petitioners are private citizens incapable of acting under color of law.

The **Brown** case cites with approval the 1943 decision of United States v. Trierweiler, 52 F. Supp. 4. In **Trierweiler** the Court said:

"The amendment and the legislation are directed only against activities of the state and of its authorized agents. It does not create or add to the rights of one citizen as against another; it is, rather, a guaranty against encroachment by the state and its authorized agents upon the rights of the citizen under the Constitution of the United States. United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835; Hodges v. United States, 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65; United States v. Powell, C. C., 151 F. 648, affirmed 212 U. S. 564, 29 S. Ct. 690, 53 L. Ed. 653; United States v. Wheeler, D. C., 254 F. 611, affirmed 254 U. S. 281, 41 S. Ct. 133, 65 L. Ed. 270. **It follows, therefore, that if the indictment discloses that defendants acted in their individual capacity, or, stated otherwise, if it**

fails to aver that defendants acted under color of statutory authority, it is deficient." (Emphasis added.)

To the same effect are the cases of United States v. Lynch, 1950, 94 F. Supp. 1011, affirmed at 189 F. 2d 476, citing **Trierweiler**, the civil case of Whittington v. Johnston, 1953, 5th Circuit, 201 F. 2d 810, at p. 816, which also cites **Lynch** and **Trierweiler.**

The fifth headnote in Gebardi v. United States, 1932, 287 U. S. 112, 77 L. Ed. 206, 52 S. Ct. 648, is in this language:

"Where it is impossible under any circumstances to commit a substantive offense without cooperative action, the preliminary agreement to commit the offense is not an indictable conspiracy either at common law or under the Federal statute punishing conspiracy to violate a law of the United States."

The text of the opinion from which this headnote is taken appears at pp. 121, 122 of 287 U. S. and at p. 211 of 77 L. Ed. as follows:

"* * * If this were the only case covered by the Act, it would be within those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, Shannon v. Com., 14 Pa. 226; Miles v. State, 28 Ala. 390; cf. State v. Law, 189 Iowa 910, 11 A. L. R. 194, 179 N. W. 145; see State ex rel. Durner v. Huegin, 110 Wis. 189, 243, 62 L. R. A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332, or under the federal statute. See United States v. Katz, 271 U. S. 354, 355, 70 L. Ed. 986, 46 S. Ct. 513; Norris v. United States (C. C. A. 3d), 34

F. (2d) 839, 841 (reversed on other grounds in 281 U. S. 619, 74 L. ed. 1076, 50 S. Ct. 424); United States v. Dietrich (C. C.), 126 Fed. 664, 667. * * *"

We paraphrase Headnote 5 of Gebardi as its statement of the law is applicable to the case at bar:

> "Where it is impossible under any circumstances for Lester and Buccieri as private citizens and acting alone to commit the substantive offense denounced by 18 U. S. C., § 242 without cooperative action by persons acting wilfully and under color of law (in the case at bar, Ciafardini, Quitter and White), the preliminary agreement to commit the offense is not an indictable conspiracy either at common law or under Federal statute punishing conspiracy to violate a law of the United States."

It must be conceded that petitioners acting alone could not be guilty of 18 U. S. C., § 242.

Under the statement of the law in **Gebardi** and keeping in mind the language of 18 U. S. C., § 242, requiring wilful acts under color of law, it is at once apparent that absent cooperative action by the police defendants, petitioners could not be guilty of the preliminary agreement (conspiracy) to commit the offense of 18 U. S. C., § 242, as alleged in the indictment.

Thus it is evident that the majority opinion of the Court in the case at Bar is in direct conflict with the cases of Barron v. United States, First Circuit, 5 F. 2d 799, 801, 802; Kaufman v. United States, Second Circuit, 212 F. 613, 618; Downs v. United States, Third Circuit, 3 F. 2d 855; Koehler v. United States, Fifth Circuit, 189 F. 2d 711; Johnson v. United States, Fifth Circuit, 158 F. 69; Brown v. United States, Sixth Circuit, 204 F. 2d 247; Chadwick v. United States, Sixth Circuit, 141 F. 225; Scott v. United States, Sixth Circuit, 130 F. 429; Culp v.

United States, Eighth Circuit, 131 F. 2d 93, 98; Carter v. United States, Eighth Circuit, 19 F. 2d 431; Cohen v. United States, Ninth Circuit, 144 F. 2d 984; Curtis v. United States, Tenth Circuit, 67 F. 2d 943; and Gebardi v. United States, 1932, 287 U. S. 112, 77 L. Ed. 206, 52 S. Ct. 648, each holding that private individuals are incapable of a Section 371 conspiracy to violate laws where special capacity is required, unless one or more of the co-conspirators possess the capacity to commit the substantive offense.

Research of counsel discloses no reported case where a conspiracy conviction was upheld against two or more persons, neither of whom was capable of committing the substantive offense, the object of the conspiracy, where no other person so capable was party to the conspiracy.

2. May a Conviction of Private Persons Under 18 U. S. C., Section 371, to Violate 18 U. S. C., Section 242, Be Sustained When It Was Conclusively Established That There Was a Total Absence of State Action?

(a) Was It Error to Refuse Instruction 20 Requested by Petitioners?

Instruction No. 20 requested by Petitioners as appears at p. 61 to the Appendix of this Petition should have been given to the jury. It required a finding by the jury of the essential elements of the offenses embodied in the two counts of the indictment; that is, state action by the police acting wilfully and under color of law, aided and abetted by Petitioners in respect to Count Two, and in respect to Count One that no conviction of Petitioners might be found unless the jury believed beyond reasonable doubt that the police conspired with them to violate § 242.

Section 242 of Title 18 by its language condemns wilful conduct under color of law. The statute is saved from

unconstitutionality under the Fourteenth Amendment by the requirement of the interposition of state action as held by this Court in the recent cases of United States v. Guest, March 28, 1966, 383 U. S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239, and United States v. Price, March 28, 1966, 383 U. S. 787, 86 S. Ct. 1152, 16 L. Ed. 2d 267.

In **Price** a unanimous Court held that to state an offense under § 241 or § 242 and § 371 to violate § 242, the indictment must allege "state action." In so holding its language is:

> "In view of the detailed opinions in Williams I, it would be supererogation to track the arguments in all of their intricacy. On the basis of an extensive re-examination of the question, we conclude that the District Court erred; that § 241 must be read as it is written—to reach conspiracies 'to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . .'; that this language includes rights or privileges protected by the Fourteenth Amendment; **that whatever the ultimate coverage of the section may be, it extends to conspiracies otherwise within the scope of the section, participated in by officials alone or in collaboration with private persons**; and that the indictment in No. 59 properly charges such a conspiracy in violation of § 241. We shall confine ourselves to a review of the major considerations which induce our conclusion.
>
> 1. There is no doubt that the indictment in No. 59 sets forth a conspiracy within the ambit of the Fourteenth Amendment. Like the indictment in No. 60, supra, it alleges that the defendants acted **'under color of law'** and that the conspiracy included action by the State through its law enforcement officers to punish the alleged victims without due process of law

in violation of the Fourteenth Amendment's direct admonition to the States.

The indictment specifically alleges that the sheriff, deputy sheriff and a patrolman participated in the conspiracy; that it was a part of the 'plan and purpose of the conspiracy' that Deputy Sheriff Price, 'while having [the three victims] . . . in his custody in the Neshoba County Jail . . . would release them from custody at such time that he [and others of the defendants] . . . could and would intercept [the three victims] . . . and threaten, assault, shoot and kill them.'

This is an allegation of state action which, beyond dispute, brings the conspiracy within the ambit of the Fourteenth Amendment. It is an allegation of official, state participation in murder, accomplished by and through its officers with the participation of others. It is an allegation that the State, without the semblance of due process of law as required of it by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail so that they were not charged and tried as required by law, but instead could be intercepted and killed. If the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all.

As we have consistently held 'The Fourteenth Amendment protects the individual against **state action**, not against wrongs done by **individuals**.' Williams I, 341 U. S., at 92, 95 L. ed. at 772 (opinion of Douglas, J.). In the present case, the participation by law enforcement officers, as alleged in the indictment, is clearly state action, as we have discussed, and it is therefore within the scope of the Fourteenth Amendment.''

And, of course, proof must follow such allegation as allegation without such proof cannot be sustained.

In **Guest** the indictment was for conspiracy in violation of 18 U. S. C., § 241, accusing six private citizens. Section 241 in the part relevant in **Guest** reads:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . .
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years or both. June 25, 1948, C. 645, 62 Stat. 696."

No language in the statute requires state interposition, but there is implicit in all acts of Congress the mandates of the Constitution which in respect to **Guest** and at Bar are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws."

The only allegation of the indictment in **Guest** (by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts) alleging state action saved the indictment from being bad on demurrer or, as now practiced, from a motion to dismiss. This was the sole ground upon which the second numbered paragraph of the indictment was held to state an offense. So said Mr. Justice Stewart writing for the Court at pp. 248-249 of 16 L. Ed. 2d in these words:

> ". . . The allegation of the extent of official involvement in the present case is not clear. It may charge no more than co-operative private and state action similar to that involved in Bell, but it may go consid-

erably further. For example, the allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection Clause. Although it is possible that a bill of particulars, or the proofs if the case goes to trial, would disclose no co-operative action of that kind by officials of the State, the allegation is enough to prevent dismissal of this branch of the indictment."

Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Fortas, concurring in a separate opinion at 16 L. Ed. 2d 251, wrote:

"The appellees contend that the indictment is invalid since 18 U. S. C., § 241, under which it was returned, protects only against interference with the exercise of the right to equal utilization of State facilities, which is not a right 'secured' by the Fourteenth Amendment in the absence of State action. With respect to this contention the Court upholds the indictment on the ground that it alleges the conspiracy was accomplished, in part, 'by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts.' The Court reasons that this allegation of the indictment might well cover active connivance by agents of the State in the making of these false reports or in carrying on other conduct amounting to official discrimination. By so construing the indictment, it finds the language sufficient to cover a denial of rights protected by the Equal Protection Clause. The Court thus removes from the case any necessity for a 'determination of the threshold level that State action must attain in order to create rights under the Equal Protection

Clause.' A study of the language in the indictment clearly shows that the Court's construction is not a capricious one, and I therefore agree with that construction, as well as the conclusion that follows."

Mr. Justice Harlan at p. 252 of the report states his concurrence with Justices Stewart, Clark, Black, and Fortas in these words:

"I join Parts I and II of the Court's opinion, but I cannot subscribe to Part III in its full sweep. To the extent that it is there held that 18 U. S. C., § 241 (1964 ed.), reaches conspiracies, embracing only the action of private persons, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent . . ."

Mr. Justice White, not being in dissent, obviously voted with the majority resulting in this term's pronouncement by six Justices of our Supreme Court that rights under Amendment XIV **"arise only when there has been involvement of the State or of one acting under color of its authority."**

We quote from **Guest** at 16 L. Ed. 2d 248:

"As Mr. Justice Douglas more recently put it, 'The Fourteenth Amendment protects the individual against **state action**, not against wrongs done by **individuals**.' United States v. Williams, 341 U. S. 70, 92; 95 L. Ed. 758, 772, 71 S. Ct. 581 (dissenting opinion). **This has been the view of the Court from the beginning.** United States v. Cruikshank, supra; United States v. Harris, 106 U. S. 629, 27 L. Ed. 290, 1 S. Ct. 601; Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 836, 3 S. Ct. 18; Hodges v. United States, 203 U. S. 1, 51 L. Ed. 65, 27 S. Ct. 6; United States v. Powell, 212 U. S. 564, 53 L. Ed. 653, 29 S. Ct. 690. **It remains the Court's view today.** See, e. g., Evans v. Newton,

382 U. S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486; United States v. Price, 383 U. S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152."

In United States v. Price the first count of the indictment charged the Sheriff, Deputy Sheriff, and patrolmen together with private individuals with conspiracy to violate § 242, in the language of the statute similar to the first count of the indictment in the case at Bar.

The District Court held the indictment good on this count. No appeal was taken from the decision of the trial court with respect to the first count, and the matter was not before this Court for adjudication. However, the Court in referring to the first count of the indictment in the **Price** case stated:

> "On a motion to dismiss, the District Court sustained this First Count as to all defendants. As to the sheriff, deputy sheriff and patrolman, the court recognized that each was clearly alleged to have been acting 'under color of law' as required by § 242. As to the private persons, the District Court held that '[I]t is immaterial to the conspiracy that these private individuals were not acting under color of law' because the count charges that they were conspiring with persons who were so acting. See United States v. Rabinowich, 238 U. S. 78, 87, 59 L. Ed. 1211, 1214, 35 S. Ct. 682.
>
> "The court necessarily was satisfied that the indictment, in alleging the arrest, detention, release, interception and killing of Schwerner, Chaney and Goodman, adequately stated as the purpose of the conspiracy, a violation of § 242, and that this section could be violated by 'wilfully subject[ing] the victims to the deprivation of their right, privilege and immunity' under the Due Process Clause of the Fourteenth Amendment."

While it was immaterial to the conspiracy in the case at Bar that petitioners, private individuals, were not acting under color of law, but they could do so by conspiracy with the police officers, Section 242 could only be violated by the wilful acts of the police officers acting under color of law, and petitioners could only be guilty if they and the police officers conspired to violate the statute. But the police officer defendants and these petitioners were found not guilty of the substantive offense in Count Two of the indictment and the police officers were found not guilty under Count One of the indictment of conspiring with the petitioners.

No matter how guilty the police officers may appear to the Court from the evidence, the fact remains that they (the police officers) were found not guilty by the jury, both of the substantive offense and of the conspiracy to violate § 242. By the verdict no crime has been committed.

Speculation of the reasons for a jury's verdict of not guilty is but an abstraction. On p. 5 of the opinion (Appendix page 64), the Court intimates that the "evidence was ample to sustain a conviction of all defendants on both counts". The Court is not the trier of the facts and it cannot impeach a jury's verdict of not guilty. It is not believed that an impeachment of a jury's verdict of not guilty (as is done in the majority opinion) has been attempted since the year 1752 in the case of Rex v. Owen, 18 Howell, State Trials, 1203. This was a famous English prosecution for a criminal libel against Parliament, in which, although publication had been proved, the jury had found the defendant not guilty. The trial judge, at the insistence of the attorney for the Crown, asked the jury whether they had found the defendant not guilty "because publication had not been proved". The answer of the jury has become a classic. Through the foreman, they answered: "Not guilty, not guilty. That is our verdict, my Lord, and we abide

by it." One familiar with the law of criminal libel as it then stood, can understand the importance of the answer and the courage of the jury in giving it. Truth was not a defense. And when publication was proved, the offense was complete. Had the jurors answered the Court's question affirmatively, their answer could have been considered a special verdict, and the verdict of not guilty nullified. Had they answered it negatively, they would have stood impeached. For publication had been proved. By giving this courageous answer, these twelve men, who, as the record of the case shows, were drapers and other tradesmen, not only saved their verdict but wrote a glorious incident in the history of trial by jury in the English-speaking world, and in the history of free speech.

As Judge O'Sullivan stated in his dissenting opinion at page 12:

> "The alleged plan to violate § 242 involved no one capable of committing the proscribed act. The officers, as long as they were innocent dupes could not arrest Ratterman **wilfully and without probable cause**; the petitioners, as civilians, could not, acting under color of law, arrest Ratterman at all." (Emphasis added.)

And again at page 13 of Judge O'Sullivan's opinion:

> "The jury verdict can mean only that the offense described in § 242 was not committed. Therefore, no one **caused 'an act to be done'** which was 'an offense against the United States'." (Emphasis added.)

At page 16 of the dissenting opinion, Judge O'Sullivan, quoting from **Guest**, said:

> "Although it is possible that a bill of particulars, or the proofs if the case goes to trial, would disclose

no cooperative action of that kind by officials of the state, the allegation is enough to prevent dismissal of this branch of the indictment."

At page 16, Judge O'Sullivan in his dissent, quoted from the partial dissent of Mr. Justice Brennan of his understanding of the majority holding in **Guest:**

> "I understand this to mean that no matter how compelling the proofs that private conspirators murdered, assaulted, or intimidated Negroes * * * the prosecution under the second numbered paragraph must fail, in the absence of proofs of active **connivance** of law enforcement officers with private conspirators in causing the false arrests." (Emphasis added.)

We have emphasized the word "connivance" as used by Mr. Justice Brennan and we call the Court's attention to the definition of connivance as being "an agreement or consent, indirectly given, that something unlawful shall be done by another." Bouvier's Law Dictionary, Third Revision, states that connivance necessarily involves criminality on the part of the individual who connives. Applying the Justice's understanding of **Guest** to the case at bar, of necessity the police would have had to have acted wilfully and under color of law as opposed to the majority opinion that they could have been "innocent dupes." The term "connivers" is the antithesis of "innocent dupes."

Paraphrasing the Justice's comment it might be said:

> "I understand this to mean that no matter how compelling the proofs that private conspirators engaged among themselves that they would subject an inhabitant of Kentucky to the deprivations of any rights or immunities secured or protected by the Constitution or laws of the United States, the prose-

cution under Count 1 of this indictment must fail, in the absence of proofs of active connivance of law enforcement officers with private conspirators."

Proof of the offense must follow the allegation as allegation without proof thereof is as abortive as proof without allegation. An indictment alone is not sufficient. Proof must follow and the offense must be established. In this case it was not.

The court's refusal of Petitioners' offered instruction permitted the jury, as it did, to find that no defendant violated 18 U. S. C., § 242, that no person capable of acting under color of law conspired with anyone in violation of 18 U. S. C., § 371, **but to further find that Petitioners by agreement only between themselves could be found guilty of conspiracy without any action upon their part under color of law.**

The indictment alleges the object of the conspiracy to be a violation of 18 U. S. C., § 242, that is, the commission of the substantive offense which could not be committed by Petitioners acting alone as private citizens. By the jury verdicts it is conclusively established that no person whomsoever acting under color of law committed any offense. So the verdict here lacks any support in the evidence that any act under color of law was done, or any agreement between Petitioners was entered into by them to act under color of law. If Petitioners conspired at all it could only be to perform an impossibility.

Had petitioners' offered instruction No. 20 been given, the incongruous verdict finding petitioners guilty of conspiracy between themselves could not have been returned. We submit that it was reversible error to refuse the request.

Thus it is evident that the majority opinion of the case at Bar is in direct conflict with the above cases of United

States v. Guest, 383 U. S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239, and United States v. Price, 383 U. S. 787, 86 S. Ct. 1152, 16 L. Ed. 2d 267.

3. May 18 U. S. C., Section 2 Be Applied to 18 U. S. C., Section 371 to Sustain a Conviction of Petitioners as Private Persons Convicted Under Section 371 to Violate Section 242, Where No Person Acting Wilfully Under Color of Law and Capable of Violating Section 242 Conspired With Those Convicted, and Where Upon Count Two of the Same Indictment the Jury's Verdict of Not Guilty Conclusively Established That There Was No Violation of Section 242 or Section 2?

(a) Function of 18 U. S. C., § 2 (a) (b).

(b) In Every Criminal Offense Must There Be a Principal Capable of Committing the Offense?

Petitioners, private individuals, were convicted of conspiracy pursuant to 18 USC, § 371, to violate 18 USC, § 242. There were no police officers or anyone capable of acting under color of law found guilty of conspiracy with petitioners. Admittedly there was no evidence of the existence of "persons unknown", who acted under color of law. Petitioners together with three police officers and another private individual were acquitted and found not guilty of the violation of the substantive offense denounced by 18 USC, § 242, and of the offense denounced by 18 USC, § 2 (a) (b). Thus petitioners, private individuals, stand alone convicted of conspiracy to violate 18 USC, § 242.

The entire thrust of the Government's theory to sustain this conviction was bottomed upon the claimed application of 18 USC, § 2 (a) (b), to 18 USC, § 371, in that it was argued that two private individuals can conspire to cause innocent police officers (who have been found not

guilty of the charge of conspiracy) to act innocently to commit a violation of § 242.

Title 18, U. S. C., § 2 (b), was amended in 1951. However, the amendment did not enlarge criminal liability but is merely a restatement of existing law. Pereira v. United States (1953—5th), 202 F. 2d 830, at p. 837:

> "* * * In that respect, Section 2 (b) does not enlarge criminal liability, but is merely a restatement of existing law. See United States v. Paglia, 2 Cir., 190 F. 2d 445, 448; United States v. Chiarella, 2 Cir., 184 F. 2d 903, 909, 910. * * *"

Petitioners were found not guilty of violation of the substantive offense denounced by 18 U. S. C., § 242, and the offense denounced by 18 U. S. C., § 2 (a) (b). The majority opinion has upheld the conviction of these private individuals on the theory that they have violated 18 U. S. C., § 2 (a) (b), by agreeing to cause innocent police officers to violate § 242. When an individual has been acquitted, there can be no presumption or assumption of his guilt on that particular offense. In fact, there is always a presumption of innocence, until one is proven guilty beyond a reasonable doubt.

To sustain the judgment below the majority opinion discusses and at p. 6 quotes the aider and abettor statute which reads:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal. (and)
>
> "(b) Whoever wilfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States, is punishable as a principal." (Italics added.)

and states that petitioners' argument that as private citizens they were incapable of acting under "color of law"

and hence were incapable of the offense defined in § 242 they could not be guilty of conspiring to commit a violation of § 371, misconceives the function of this aider and abettor statute. It is respectfully submitted that the Court in the majority opinion has, rather than petitioners, misconceived the function of the statute.

Preliminary to a discussion of the function of this statute, 18 U. S. C., § 2, petitioners again point out that they have been acquitted of its violation. See Count Two of the indictment at p. 58 of Appendix of Petitioners where the concluding words of the accusation of "all in violation of Title 18, United States Code, § 242 and § 2."

In the light of the acquittal upon Count Two, the language at pp. 6-7 of the opinion that an indictment need not specifically charge "aiding and abetting" or "causing" the commission of the offense in order to support a jury verdict based upon a finding of either, is but academic. Here the charge under this statute that petitioners either aided, or abetted, or counseled, or commanded, or induced, or procured the commission of an offense against the United States has been answered in the negative by the jury's verdict of "Not Guilty".

So also under (b) of the statute the charge that petitioners caused an act to be done, which if directly performed by them, or either of them, or another would be such offense, has been similarly answered by the verdict of "Not Guilty".

The Court further states on p. 6 of the opinion that:

> "In keeping with the provisions of § 2, it has long been held that an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States in order to support a jury verdict based upon finding of either."

This is a general statement of the law with which petitioners have no quarrel, except in the majority opinion's application of it to the case at Bar. The petitioners were found not guilty of the charge of § 2 (a) (b) of aiding and abetting or causing the commission of an offense against the United States. They were as private citizens found guilty of a conspiracy to violate § 242 without a co-conspirator capable of violating § 242. **Title 18, § 2 (a) (b), is not applicable to a conspiracy.** Conspiracy is not a substantive offense. It is dependent upon an agreement to commit the substantive offense. To aid or abet, counsel or command, procure or cause one or another to commit a crime does not presuppose the existence of a conspiracy.

The majority opinion further states at p. 6:

> "All indictments must be read in effect, then, as if the alternatives provided by 18 U. S. C., § 2, were embodied in each count thereof."

To support the foregoing statement the Court cites the cases of Nye & Nisson v. United States, 336 U. S. 613, 619 (1949); Remus v. United States, 291 F. 513 (Sixth Circuit, 1923); and Fed. R. Crim. P. 7 (c). Neither of these cases nor does the rule in any manner hold or provide that § 2 must be considered as embodied in a charge of conspiracy and they are not authority for what the majority opinion states to be the law. In fact there is no authority for such holding. **Nye & Nisson** involved an indictment for defrauding the United States and conspiracy under § 371 to defraud the United States. Here it must be observed that any person or persons whomsoever could be guilty of defrauding the United States and accordingly could be guilty of conspiring to defraud the United States. Its further holding is that one who aids and abets the commission of a **completed offense** is guilty as a principal. That is not the case at bar. No offense under § 242 and § 2 was committed. The **Remus** case was one involving the

offense of maintaining a nuisance, a misdemeanor, wherein the completed offense of maintaining the nuisance was established by abundant proof. The proof against Remus was that he aided and abetted the maintenance of a nuisance and, of course, was under the indictment a principal. Under the statute in **Remus** any one could be guilty of maintaining a nuisance whether he did so alone or with others. But to be guilty of aiding and abetting in **Remus** the government was required to and did show that the completed offense of maintaining a nuisance was committed. At bar, the offense denounced by § 242 and § 2 was conclusively shown to have not been committed.

There are three separate and distinct classes of crimes; namely, (1) completed substantive offenses; (2) aiding, abetting or counseling another to commit them; and (3) conspiracy to commit them. See Pinkerton v. United States, 1945, 238 U. S. 640, at p. 1497 of 90 L. Ed. Each of these crimes requires different elements of proof. Pereria v. United States, 1954, 347 U. S. 1, 74 S. Ct. 358, at p. 445 of 98 L. Ed. wherein it was held that aiding and abetting, and counseling are not terms which presuppose the existence of an agreement. It must follow that causing an act to be done, which if performed directly by petitioners, or another, does not and could not presuppose the existence of an agreement which is the gist of a conspiracy. However, in the instant case the offense denounced in § 242 was not committed. Therefore, no one caused an act to be done which was an offense against the United States and § 2 can have no application. See dissenting opinion at p. 13 (Appendix page 72).

The majority opinion, if sustained in respect to § 2 (a) (b), would eliminate the burden of proving the agreement by merely establishing an aiding, abetting or causing § 242 to be violated.

In a criminal conspiracy the conspiracy is the gist of the crime. Hoffman v. Halden (1959), 268 F. 2d 280, and

other cases cited, and Note 17 on p. 295 of that case. And the function of the overt act is to show that the agreeing or conspiring has progressed from the field of thought and talk into action. It completes the offense. See Note 18, p. 295 of **Hoffman v. Halden.** Without an agreement there can be no conspiracy. To violate § 242, Title 18, U. S. C., there must be color of law, in the instant case, a conspiracy with a police officer. It is ridiculous to assume that the acquitted officers agreed to conspire, they were found not guilty of the substantive count and not guilty of the conspiracy count. **If the police officers did not conspire with petitioners, how could petitioners conspire with the police officers?** In the absence of a conspiracy with police officers, there is no color of law.

As stated by the dissent at bar at p. 13 (Appendix page 72), § 2, is merely a codification of the familiar common law principle and it follows that its meaning and application here, if indeed it applies at all (which petitioners deny), must be governed by the principles of the common law as understood and applied in the national courts as distinguished from those of the states. This is of necessity so because there can be no crimes against the United States except those denounced by statutes. Thus it has been held by the Supreme Court in United States v. Mills, 1833, 7 Pet. 138, 8 L. Ed. 636, that where the offense charged in an indictment is a misdemeanor, as here, all accused are principals and the doctrine applicable to principal and accessory in case of felony does not apply. But in **Mills** the specific holding was that the indictment must allege that the offense alleged against the chief actor (principal) **had in fact been committed.** And it, of course, follows that proof of the offense must follow the allegation **as allegation without proof thereof is as abortive as proof without allegation.** Stated another way as Judge Hutcheson of the Fifth Circuit did in Grimsley v. United States (1931), 50 F. 2d 509, 511:

"I have always supposed that as an indictment without proof cannot support a conviction, so proof without indictment cannot."

Although the former technical distinction between the applicability of the law of aiders and abettors in respect to misdemeanors as distinguished from felonies has probably now been abolished by statute, yet in effect the former law was but a distinction without a difference. This is so because in either the offense **must be alleged and proven to have been committed to sustain a conviction.** So said the Supreme Court in **Mills** and where felony was alleged against Aaron Burr for aiding and abetting, Chief Justice Marshall sitting in Circuit with Judge Griffin in the District of Virginia, August 31, 1807, reported in 25 Fed. Cas. 177-178, Case No. 14,693, 2 L. Ed. 700, 701, pronounced by the Court these principals, *inter alia,* of the law of aiders and abettors:

"It is a settled principle in the law that the accessory cannot be guilty of a greater offense that his principal. The maxim is *accessorius sequitur naturam sui principalis;* the accessory follows the nature of the principal. Hence results the necessity of establishing the guilt of the principal before the accessory can be tried. For the degree of guilt which is incurred by counselling or commanding the commission of a crime depends upon the actual commission of that crime. No man is an accessory to murder unless the fact has been committed.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A. shall be established in a 504*] prosecution *against B. Consequently, if the guilt of B. depends on the guilt of A., A. must be convicted before B. can be tried. It would

exhibit a monstrous deformity, indeed, in our system, if B. might be executed for being accessory to a murder committed by A. and A. should afterwards, upon a full trial, be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessory was originally the same, and although in many instances it is still the same, the accessory could, in no case, be tried before the conviction of his principal, nor can he yet be tried previous to such conviction, unless he requires it, or unless a special provision to that effect be made by statute.

If, then, this was a felony, the prisoner at the bar could not be tried until the crime was established by the conviction of the person by whom it was actually perpetrated.

Is the law otherwise in this case, because, in treason all are principals?

Let this question be answered by reason and by authority.

Why is it that in felonies, however atrocious, the trial of the accessory can never precede the conviction of the principal? Not because the one is denominated the principal and the other the accessory, for that would be ground on which a great law principle could never stand. Not because there was, in fact, a difference in the degree of moral guilt, for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe, is, perhaps, of the two the blacker criminal: and, were it otherwise, this would furnish no argument for precedence in trial.

What, then, is the reason?

It has been already given. The legal guilt of the accessory depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself."

So it is seen that from earliest times there can be no conviction of an aider or abettor absent allegation and proof of the principal's guilt, or, stated another way, allegation and proof must be made of a completed crime before there can be a violation of § 2. Section 242 is in effect similar to § 656 of Title 18, U. S. C. Each limits the class of persons who can violate their provisions. Private individuals alone cannot violate either. Under certain conditions private individuals may be capable of aiding, abetting, or causing a violation of either statute and may also be capable of conspiracy to violate either statute. However, to aid, abet, cause, or conspire the guilt of a principal actor or co-conspirator capable of violating either statute, must be established, otherwise no crime has been committed.

So it was required of the Government to prove that Petitioners conspired to and with the police acting under color of law and wilfully to deprive Ratterman of certain rights. So, it is charged in the indictment.

At page 7 of the opinion at bar it is said:

> ". . . For it was held long ago that even though 'a defendant was incompetent to commit the offense as principal by reason of not being of a particular age, sex, condition, or class, he may, nevertheless, be punished as a procurer or abettor.' (United States v. Snyder, 14 Fed. 554, 556 (C. C. D. Minn. 1882).)
>
> "This doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as Regina v. Saunders, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se*, at least as early as the 14th century. (See: **United States v. Gooding**, 25 U. S. (12 Wheat.) 460 (1827); **Sayre, Criminal Responsibility for the Acts of Another**, 43 Harv. L. Rev. 689 (1930).)"

Petitioners cannot refute this statement. It has always been the law that one incapable of committing an offense may yet be guilty of procuring or abetting its commission. **But this presupposes that the offense has in fact been committed. At bar it was not.** There are no aiders or abettors or procurers in misdemeanors. All are principals. And who would say that there could be a principal in a non-existent crime? And upon this record, whom did petitioners aid or abet or counsel or procure or cause to commit an offense against the United States? The jury said "No One."

In the **Snyder** case cited by the Court the offense charged was the filing by a postmaster of a false return to the Post Office Department and that Snyder's co-defendant, Bertram, aided and abetted Snyder, the postmaster. The principal witness against Bertram was Snyder through whom the government established the completed offense of filing the false return. The conviction against Bertram as an aider and abettor was upheld but only because it was shown that the completed offense of the filing of a false return by the postmaster had in fact been done. This **Snyder** case cannot support the majority opinion.

In the old English case of Regina v. Saunders, it appeared that Saunders, wishing to kill his wife, confided in his friend Archer, who advised him to poison her and procured and gave to him the necessary poison. This Saunders inserted in a roasted apple, which he gave to his wife; his wife gave the apple to their three-year-old daughter who ate it in Saunder's presence, he being unable to stop her lest he be suspected. Upon the death of the daughter, Saunders was charged as principal and Archer as accessory to the murder. Saunders was convicted; the real problem arose as to Archer. "For the Offense which Archer committed was the Aid and Advice which he gave to Saunders, and that was only to kill

his Wife, and no other," reads the report. "Archer did not precisely procure her Death, nor advise him to kill her, and therefore whether or no he should be Accessory to this Murder which happened by a Thing consequential to the first Act, seemed . . . doubtful." The judges finally, however, with evident reluctance, concluded that there could be no conviction, because Archer's "assent cannot be drawn further than he gave it, for the poisoning of the Daughter is a distinct Thing from that to which he was privy, and therefore he shall not be adjudged Accessory to it."

It is to be noted that in this opinion delivered by the Chief Justice of the Common Bench in the eighteenth year of the reign of Queen Elizabeth the alleged accessory, or aider and abettor, Archer, was acquitted by the court.

Nor does the **Gooding** case lend support to the majority holding. We refer the Court to Page 696 of the report of the case in 6 L. Ed.:

> "* * * On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, **if it is done**, is guilty of the crime, and the act is his act * * *" (emphasis ours).

This quotation from **Gooding** is almost in the same language of **Mills**, supra.

Each of the cases of **Snyder**, **Saunders** and **Gooding** support the position of petitioners.

At p. 9 of the Court's opinion, it is written:

> "We can perceive no basis in reason or policy to distinguish **a case of willfully causing innocent police officers**, 'acting under color of law', to deprive another of his civil rights, from a case of willfully causing an

innocent bank clerk to mail a fraudulently obtained check (**Pereira v. United States**, *supra*, 347 U. S. 1), or causing a lender to make a false report of prices paid for homes (**United States v. Selph**, *supra*, 82 F. Supp. 56), or causing a union representative to receive money unlawfully from employers (**United States v. Inciso**, *supra*, 292 F. 2d 374), or causing a licensed dealer in firearms to fail to maintain required records (**United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle**, *supra*, 250 F. Supp. 410)."

But in **Pereira** the bank clerk mailed the check, in **Selph** the false report of prices paid for homes was made, in **Inciso** the union unlawfully received money from the employers. Only in **Pereira** was conspiracy alleged, and it was to violate the mail fraud statute and in each case relied upon by the Court the **ultimate offense was committed.** At bar no offense under § 242 or § 2 was committed and the acquittal of the police conclusively established the absence of "state action and wilfulness" required by the statute **and the Constitution.**

The case of the Military Rifle, 250 F. Supp. 410, relied upon in the majority opinion, has been reversed by the Fifth Circuit on July 29, 1966, in Case No. 23637 under the title King v. United States (not yet reported at the time of the preparation of this Petition) and in the opinion which interprets 18 U. S. C., § 2 the Court said:

> "The principle that one cannot be guilty of aiding and abetting the commission of an offense unless another person has committed a criminal violation seems well-reasoned. It is also well-supported by authority. E. g., Shuttlesworth v. Birmingham, 373 U. S. 262 (1963); Edwards v. United States, 286 F. 2d 681 (5 Cir. 1960)."

Petitioners quote from Von Patzoll v. United States (1947—10th), 163 F. 2d 216, at p. 219 where it is said:

> "The proof must establish that the offense was committed by some one and that the person charged as an aider and abettor, aided and abetted in its commission. However, it is not necessary to identify the actual perpetrator of the crime. He may be unknown."

Similarly in Hernandez v. United States (1962—9th), 300 F. 2d 114, at pp. 123-124 it is said:

> "* * * Further, conviction as an aider and abettor requires proof that the crime has in fact been committed by the principal. * * *"

So also it was said in the Tenth Circuit Court in 1952, Colosacco v. United States, 196 F. 2d 165, at p. 167:

> "While conviction of the principal is not a prerequisite to the conviction of the aider and abettor, the proof must establish beyond a reasonable doubt that the offense was committed by someone and that the person charged as an aider and abettor aided and abetted in its commission."

That the majority opinion misconceives the function of 18 U. S. C., § 2 (a) (b) is most forcefully illustrated by the case of United States v. Tornabene (3rd Cir., 1955), 222 F. 2d 875, involving an indictment under 18 U. S. C., § 656. The Government contended in **Tornabene** that the indictment could be read to charge either a violation under § 656 or a violation under § 2 (a). Neither of the appellants in that case was capable of an offense under § 656 since the statute limited the class of persons who could violate its provisions to bank personnel. In ordering a reversal of the conviction of appellants and quashing the indictment the Court said:

> "We will first consider whether Count 1 charges a crime under Section 656. That section distinctly limits the class of persons who can violate its pro-

visions, i. e., officers, directors, agents, employees, etc. See United States v. Weitzel, 1918, 246 U. S. 533, 38 S. Ct. 381, 62 L. Ed. 872. The government concedes this much. It is not alleged that either Caplan or Tornabene fall within any of the designated classes. But this does not end the matter, according to the government.

The government says that since Section 2 (a) is not confined to a limited class, both Caplan and Tornabene were capable of aiding and abetting in a violation of Section 656. So far, the government is correct, Coffin v. United States, 1895, 156 U. S. 432, 15 S. Ct. 394, 39 L. Ed. 481, and with this phase of the government's theory, the appellants agree.

The government then argues that if A can commit a crime by aiding and abetting B in doing an act, it is sufficient to indict A for doing the principal act, even if at trial the proof shows that A only aided and abetted in the commission of the act which constituted the crime. As an abstract principle, this is good law, and we have been referred to many cases relied upon by the district court and cited by the government, i. e., United States v. Klass, 3 Cir., 1948, 166 F. 2d 373; Von Patzoll v. United States, 10 Cir., 163 F. 2d 216, certiorari denied 1947, 332 U. S. 809, 68 S. Ct. 110, 92 L. Ed. 386; DiPreta v. United States, 2 Cir., 1920, 270 F. 73.

But there is a distinct and essential difference between this case and those to which we have been referred. In all those cases, the defendant was capable of committing the crime as well as aiding and abetting in its commission. Thus, an indictment against A for mail fraud is valid because it charges a crime, and it is well settled that no fatal variance occurs if only aiding and abetting another in committing mail fraud is proved at trial, since an aider and abettor can be treated as the principal. The theory of this

doctrine is sound, because if a grand jury has indicted A for mail fraud, the grand jury has charged a crime, and the indictment on its face is good.

But here, if the indictments are read as charging Caplan and Tornabene with willful misapplication of bank funds, no federal crime is charged. They alone cannot violate Section 656, as it is not alleged that they were members of the designated class under this section.

But, as the appellants concede, the indictment is sufficient if it charges them with aiding and abetting a bank official in committing the crime. This brings us to the second government theory—namely, that the indictments are sufficient because they adequately charge appellants with aiding and abetting under Section 2 (a).

An indictment is not sufficient unless it charges all essential elements of a crime. Essential to the crime of aiding and abetting a bank official in violating Section 656 is the guilt of the bank official. See United States v. Pyle, S. D. Cal. 1921, 279 F. 290, 293. Without this element, there is no crime, so far as the federal government is concerned, for if no designated person who falls within the Section 656 classification has violated the section, then no one can be guilty of aiding and abetting.

The majority opinion in respect to § 2 is that the police defendants were the actors (principals) and petitioners the aiders and abettors, or, as in **Mills**, their conduct is secondary in character. But if the alleged actors committed no offense, the petitioners could not have aided or abetted them or **caused them to act.** The verdict here, as Judge O'Sullivan's dissent points out, "denies the existence of the essential facts." Page 14 of Judge O'Sullivan's dissenting opinion.

The case of United States v. Johnson (U. S. D. C., D. Md., 1963), 215 F. Supp. 300, contains a footnote on p.

314 citing the **Tornabene** and other cases with the statement that "a charge against an alleged aider and abettor must fall if no sufficient charge is made against the principal."

Another case involving aiding and abetting under § 2 in violation of § 656 is that of Giragosian v. United States (1965—1st), 349 F. 2d 166, where the Court said at pp. 167-168:

> "Since Giragosian was not an officer, director, agent or employee of the bank, he could not be guilty as a principal under 18 U. S. C., § 656 for misapplication of the bank's funds, but only as an aider and abettor. Logsdon v. United States, 253 F. 2d 12, 14 (6th Cir. 1958); United States v. Tornabene, 222 F. 2d 875, 878 (3d Cir. 1955); United States v. Pyle, 279 F. 290 (S. D. Cal. 1921). In order to convict Giragosian of aiding and abetting it was necessary for the Government to prove that Page himself was guilty of the primary offense, that is, that he willfully misapplied the bank funds. Coffin v. United States, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109 (1896); United States v. Fromen, 265 F. 2d 702, 705 (2d Cir.), cert. denied, 360 U. S. 909, 79 S. Ct. 1295, 3 L. Ed. 2d 1260 (1959); United States v. Tornabene, supra; United States v. Pyle, supra. While there can be no doubt that there was abundant evidence to support a finding that Giragosian was guilty of aiding and abetting the misapplication of bank funds if Page was guilty of the substantive offense, in our view the evidence was wholly insufficient to warrant the jury in concluding beyond a reasonable doubt that Page was guilty of a willful misapplication of the bank's funds in violation of 18 U. S. C., § 656."

Paraphrasing the language of **Giragosian** as its principle of law here applies it could be said:

"Since petitioners as private citizens possessed no capacity to act wilfully under color of law, they could not be guilty as principals under 18 U. S. C., § 242, but only as aiders and abettors. In order to convict petitioners it was necessary for the government to prove that the police themselves were guilty of the primary offense, that is, that the police acted wilfully and under color of law in violation of § 242."

In the case of United States v. Pihakis (1955—3rd), 224 F. 2d 898, the Court relied upon its earlier decision in **Tornabene** to quash the first two counts of the indictment.

The principle announced in **Tornabene** was approved in 1957 by the Seventh Circuit in Banks v. United States, 239 F. 2d 409.

The **Tornabene** case cites United States v. Pyle (S. D. Cal., S. D.—1921), 279 F. 290. This case contains a detailed analysis of the Supreme Court case upon which it relies, that is, Coffin v. United States (1896), 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109. One of the Court's reference to **Coffin** appears at 279 F. 294 in this language:

"On page 672 of 162 U. S. (16 Sup. Ct. 943, 40 L. Ed. 1109) it is stated that repeatedly the jury were told that they could not find the defendants (the two aiders and abettors) guilty unless they were satisfied beyond a reasonable doubt that Haughey and the defendants had committed the specific criminal acts alleged in the counts of the indictment with the intent therein charged. It is said (162 U. S. on page 675, 16 Sup. Ct. 948, 40 L. Ed. 1109), and in considering the instructions just noted:

'The charge as a whole having correctly conveyed to the jury the rule by which they were to determine from all the evidence the question of intent, we think there was no error to the prejudice of the defendant,' etc.

> "This is undoubtedly an affirmance by the Supreme Court of the correctness of the charge of the court below in the behalf indicated that the jury could not convict the abettor unless they found the principal, the bank official, had committed the criminal act charged against him."

It would appear from the majority opinion on Page 9 where it states:

> "Nor do we discern any rationale for refusing, as appellants suggest, to apply the conspiracy statute [18 U. S. C., § 371] to crimes made punishable by 18 U. S. C., § 2 (b). So long as anyone who 'willfully causes an act to be done' which, 'if directly performed by him or another would be an offense against the United States,' is punishable as a principal, it follows *a fortiori* that when two or more persons conspire willfully to 'cause' an act forbidden by § 2 (b), they *ex necessitate* conspire to 'commit [an] offense against the United States' within the meaning of 18 U. S. C., § 371."

that because § 2 (a) (b) fixes punishment as a principal for an aider and abettor that the requisite necessity for a guilty principal is obviated. But the Supreme Court in **Coffin** at 40 L. Ed. 1112, held in language necessary to its decision that:

> "In every criminal offense there must, of course, be a principal, and it follows that without the concurring act of an officer or agent of a bank, third persons cannot commit a violation of the provisions of § 5209."

On July 29, 1965, less than a year before the opinion at Bar, Judge Weick, writing for the Sixth Circuit in United States v. Hoffa, 349 F. 2d 20 at p. 40 reiterated the principle of **Mills** and **Gooding** in these words:

"Before Hoffa could be convicted as an aider and abettor, however, it was necessary for the Government to prove that the principal, Medlin, committed the crime. Shuttlesworth v. City of Birmingham, 373 U. S. 262, 265, 83 S. Ct. 1130, 10 L. Ed. 2d 335 (1963); Hendrix v. United States, 327 F. 2d 971, 975 (C. A. 5, 1964); Edwards v. United States, 286 F. 2d 681 (C. A. 5, 1960); Karrell v. United States, 181 F. 2d 981 (C. A. 9, 1950).

* * * * * * * *

"After establishing that a crime had been committed, the Government had the burden to connect Hoffa with it as an aider and abettor."

In the case of Shuttlesworth v. Birmingham, 373 U. S. 262, 10 L. Ed. 2d 335, 83 S. Ct. 11, the Court said:

"Petitioners were convicted for inciting, aiding, and abetting a violation of the city trespass ordinance. The trespass "violation" was that committed by the petitioners in Gober v. Birmingham, 373 U. S. 374, 10 L. Ed. 2d 419, 83 S. Ct. 1311. Since the convictions in Gober have been set aside, it follows that the present petitioners did not incite or aid and abet any crime, and that therefore their own convictions must be set aside.

It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act."

The teaching of **Shuttlesworth** that one may not be guilty of aiding, abetting, or inciting the performance of an innocent act may be appropriately applied to the case at Bar. The complaint against Shuttlesworth was dismissed because those whom he was accused of aiding, abetting, and inciting were not in violation of law. So here, 18 U. S. C., § 2, is inapplicable because the police and all accused were found not guilty of violating § 242,

and the police were found not guilty of conspiring with petitioners to violate § 242, and the police officers being innocent of any infraction of the law, petitioners could not have aided or abetted them, or caused an act to be done.

The case of Parr v. United States, 1960, 363 U. S. 370, 4 L. Ed. (2) 1277, 80 S. Ct. 1171, reflects an indictment of 20 counts, 19 of which were for violation of 18 U. S. C., § 1341. The court held that the conduct of defendants as reflected by the evidence did not constitute a violation of § 1341, the mail fraud statute, and that therefore the conviction on Count 20 for conspiracy to violate § 1341 could not stand. At 363 U. S., p. 393, 4 L. Ed. (2) 1292, the opinion reads:

> "Inasmuch as the twentieth count charged petitioners with conspiring to commit the offense complained of in Count 1, and inasmuch as, on the facts of this record, the count cannot be sustained, it follows that petitioners' convictions upon the twentieth count cannot stand."

Headnote 14 of the case from which the above quoted words are taken is:

> "A conviction of conspiracy to commit a substantive offense cannot stand where, on the facts presented, the count of the indictment charging the substantive offense in question cannot be sustained."

In the case at bar the jury determined that upon the evidence there has been no violation of 18 U. S. C., § 242, by anyone, and no violation by any police officer under 18 U. S. C., § 371. It would seem that the ultimate fact to be found is whether there was upon the evidence a violation of the substantive offense, whether, as here, by the jury, or as in **Shuttlesworth** and **Parr** by the court. The only distinction is without a real difference. In either

case the count charging conspiracy to violate the substantive offense cannot be sustained and by the holding in Shuttlesworth and Parr the conspiracy count must fail.

Thus it is evident that the majority opinion of the Court in the case at Bar is in direct conflict with the cases of United States v. Gooding, 1827, 25 U. S. 460, 12 Wheat. 460; United States v. Mills, 1833, 7 Pet. 138, 8 L. Ed. 636; Shuttlesworth v. Birmingham, 1963, 373 U. S. 262, 10 L. Ed. 2d 335, 83 S. Ct. 1130; Parr v. United States, 1960, 363 U. S. 370, 4 L. Ed. 2d 1277, 80 S. Ct. 1171; Coffin v. United States, 1896, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109; Giragosian v. United States, 1965, First Circuit, 349 F. 2d 166; United States v. Pihakis, 1955, Third Circuit, 224 F. 2d 898; United States v. Tornabene, 1955, Third Circuit, 222 F. 2d 875; Johnson v. United States, 1907, Fifth Circuit, 158 F. 69; King v. United States, July, 1966, Fifth Circuit, Case No. 23637, not yet reported; United States v. Hoffa, 1965, Sixth Circuit, 349 F. 2d 20; Banks v. United States, 1957, Seventh Circuit, 239 F. 2d 409; Hernandez v. United States, 1962, Ninth Circuit, 300 F. 2d 114; Von Patzoll v. United States, 1947, Tenth Circuit, 163 F. 2d 216; and Colosacco v. United States, 1952, Tenth Circuit, 196 F. 2d 165, each holding that one cannot be guilty of aiding and abetting the commission of an offense unless another person has committed a criminal violation.

Research of counsel discloses no reported case where a conviction of co-conspirators charged with § 242, Title 18, has been upheld on the theory of § 2, Title 18, U. S. C. As far as we can learn it is the first attempt of the Government to do so.

4. Did the Court Err in Not Instructing the Jury That to Convict Petitioners It Was Not Sufficient That Petitioners Had a Generally Bad Purpose, But That to Convict It Was Necessary for the Jury to Find That Petitioners Had the Specific Intent and Purpose to Wilfully Deprive Ratterman of Rights, Privileges and Immunities Secured to Him by the Fourteenth Amendment to the Constitution of the United States?

Petitioners call attention to the Court's charge which failed entirely to instruct the jury that the Government was required to prove beyond a reasonable doubt **specific intent** upon the part of appellants to conspire under § 371 to violate § 242; that is, **the specific intent to deprive of a constitutional right.** Proof beyond a reasonable doubt of such specific intent was held by the Supreme Court in Screws v. United States, supra, to be an essential ingredient of offense under what is now 18 U. S. C., § 371 and § 242. Although no exception to the trial court's charge in **Screws** was taken, the Court under Rule 52 (b) upon its own motion noted the error and upon this sole ground the judgment of conviction was reversed. In the case at bar neither the Government in brief or argument, nor the Court in opinion discussed this important contention of Petitioners and it would seem that as **Screws** remains the law today that the failure of the Court to instruct in accord with its teaching would require a reversal here.

That the Court of Appeals for the Fifth Circuit which heard the appeal of the **Screws** case, in which its affirmance of the District Court was reversed by the Supreme Court, well understood the directions given by that Court in respect to the mandatory jury instructions upon wilfullness and specific intent to deprive one of a constitutional right, it is aptly illustrated by its opinion in Pullen v. United States, 1947, 164 F. 2d 756, where **Screws** is discussed and quoted in the language at pp. 759-760 as follows:

"So we are forced to the conclusion by the opinion in the case of Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330, that the charge of the District Judge was not a 'most adequate charge' in this case. True it is that he told the jury that they must carefully consider the word 'wilfully' and that the statute provides that the 'thing done must be done wilfully,' and that in law the word 'willful' implies a conscious purpose to do wrong and a knowledge of the thing done as well as a determination to do it with evil purpose or with bad intent. But when he speaks of 'the thing done', he does not say to the jury that by the use of the term 'the thing done' he had reference to the deprivation of constitutional rights, or that he had reference to the wrongful beatings, or the wrongful inflictions of physical abuse. The opinion in the Screws case made it quite clear that the word 'willful' implies not merely 'a conscious purpose to do wrong' on the part of an officer in beating and otherwise mistreating an inhabitant while acting under color of law, but that there must be a specific intent to deprive him of a federal right, for it said in that case:

"We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.

* * * * * * * * *

"For the specific intent required by the Act is an intent to deprive a person of a right * * *.

* * * * * * * * *

"When they act willfully in the sense in which we use the word, they act in open defiance or in reckless

disregard of a constitutional requirement which has been made specific and definite.

* * * * * * * * *

"But in view of our construction of the word 'wilfully' the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To **convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e. g., the right to be tried by a court rather than by ordeal.** And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like." 325 U. S. at pages 103, 104, 105, 107, 65 S. Ct. at page 1036, 89 L. Ed. 1495, 162 A. L. R. 1330. (Emphasis added.)

"The implication seems to be evident in the Screws case that the statute did not intend to make one a criminal if **'his purpose was unrelated to the disregard of any constitutional guarantee.'**

"But the charge in the present case did not advise the jury that the Court was speaking of the willfulness with which the defendants must be found to have acted in reference to the deprivation of constitutional rights as distinguished from the intent with which they acted in arresting, jailing, beating, and otherwise maltreating their prisoner. It must be kept in mind that every beating by a state officer, no matter how willfully administered, is not a deprivation of a federal right as condemned by Sec. 52. The beating must be administered under color of law and with 'the purpose to deprive' the prisoner of a 'constitutional right,' e. g., the substitution of trial by ordeal for a trial by law.

"The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." Screws v. United States, supra, 325 U. S. at page 108, 65 S. Ct. at page 1039, 89 L. Ed. 1495, 162 A. L. R. 1330.

"Cf. Crews v. United States, 5 Cir., 160 F. 2d 746, 749.

"Assuming, but not deciding, that a good charge might rescue a defective indictment in certain situations, we, nevertheless, hold that a charge which is defective in the same particular in which the indictment is defective can perform no such function. In this case the indictment was defective in failing to allege that the deprivation was 'willful' and the charge to the jury was defective in the same particular in that it failed to charge that defendants must be found to have the purpose to deprive the prisoner of a constitutional right and not merely to have an evil purpose in the beatings and other maltreatments.

"If we understand the rationale of the decision in the Screws case, it is that in the absence of willfulness in the deprivation of a right under the Fourteenth Amendment there can be 'no ascertainable standard of guilt' and in the face of such an impelling viewpoint the defect in the indictment must be regarded as a matter of substance and the failure to allege willfulness and accurately to instruct the jury thereon must be regarded as prejudicial, even though no objection or exception to the charge was made.

"This Court in recent months has upheld the convictions in Screws v. United States, 5 Cir., 140 F. 2d 662, and Crews v. United States, 5 Cir., 160 F. 2d 746, both of which were brought under Sec. 52, charging deprivations of constitutional rights, and we are not

yet unmindful of the fact that the Supreme Court reversed us in the Screws case because of the fatal error of the trial Court in not instructing the jury on the question of the willfulness necessary to be proven in connection with the offense denounced by the Statute, and of which error the Supreme Court said: 'And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion.' Screws v. United States, supra, 325 U. S. at page 107, 65 S. Ct. at page 1038, 89 L. Ed. 1495, 162 A. L. R. 1330. The failure so to instruct the jury in the Screws case was never raised in the Court below, in the Circuit Court of Appeals, nor in the Supreme Court, but it was so substantial and material that the Court took note of it on its own motion."

As the **Screws** case remains the law today, an instruction based upon its holding should have been given to the jury and as held therein and in **Pullen** the failure so to charge requires a reversal.

CONCLUSION.

So at bar, absent the guilt of the alleged principals (the police) petitioners could not have aided or abetted them to violate § 242 which the jury said was done by no one, and the Court's holding would seem to decide that because an aider or abettor is punishable as a principal, no principal is required in a criminal offense. Here, as Judge O'Sullivan pointed out in quoting Judge Learned Hand, the jury verdict denies the existence of the essential facts, that is, a violation of § 242 or a plan to cause such violation under § 371.

Research of counsel which is believed to be definitive does not disclose any reported case in the annals of fed-

eral jurisprudence where Title 18, U. S. C., Sec. 2, has been applied, **absent allegation and proof of a completed crime**, and no reported case holding that a person can be guilty of a § 371 conspiracy where the alleged plan involves no one capable of committing the proscribed act.

It is accordingly urged that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

The Indictment.

COUNT 1.

The Grand Jury Charges:

That during the period from on or about April 3, 1961, up to and including the date of the return of this indictment, in Campbell County, in the Eastern District of Kentucky, the defendants, Charles E. Lester, Edward Anthony Buccieri, Tito Carinci, Patrick Ciafardini, Joseph Quitter and Upshire White, conspired and agreed with each other, and with other persons to the Grand Jury unknown, to commit an offense against the United States to-wit: a violation of Title 18, § 242, U. S. Code, that is to say, that Patrick Ciafardini, Joseph Quitter and Upshire White would, while acting in their official capacity as police officers of Newport, Kentucky, and under color of the laws of the State of Kentucky, wilfully deprive George W. Ratterman, an inhabitant of the State of Kentucky, of rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States; namely, the right not to be deprived of liberty without due process of law, the right to be free from arrest by an officer acting arbitrarily and without legal justification of cause, and the right not to be denied the equal protection of the law.

It was the plan and purpose of the conspiracy that Patrick Ciafardini, Joseph Quitter and Upshire White, while acting as police officers under color of law, would arrest and imprison George W. Ratterman, charge him with a violation of law, and cause his conviction, all knowing him to be innocent.

In furtherance of the conspiracy and to the effect the objects thereof, and within the jurisdiction of this Court,

the defendants did commit, among others, the following overt acts:

(1) On or about April 14, 1961, in Newport, Kentucky, Charles E. Lester asked Thomas Withrow to take a photograph.

(2) On or about April 14, 1961, in Newport, Kentucky, Edward Anthony Buccieri conversed with Thomas Withrow.

(3) Patrick Ciafardini on the early morning of May 9, 1961, while off duty, went to police headquarters at Newport, Kentucky.

(4) Patrick Ciafardini, with Joseph Quitter and Upshire White, arrested George W. Ratterman, in Newport, Kentucky, in the eary morning of May 9, 1961.

(5) On or about May 13, 1961, in Newport, Kentucky, Charles E. Lester and Tito Carinci conversed with Juanita Jean Hodges and Bonnie Green.

(6) On or about May 17, 1961, at Newport, Kentucky, Patrick Ciafardini testified in the trial of George W. Ratterman.

All in violation of Title 18, United States Code, §§ 371 and 242.

COUNT 2.

The Grand Jury Further Charges:

That on or about May 9, 1961, at Newport, Kentucky, in the Eastern District of Kentucky, and within the jurisdiction of this court, Patrick Ciafardini, Joseph Quitter and Upshire White, while acting in their official capacities as police officers of Newport, Kentucky, under color of the laws of the State of Kentucky, and aided and abetted by Charles E. Lester, Edward Anthony Buccieri and Tito Carinci, did wilfully arrest George W. Ratterman, an inhabitant of the State of Kentucky, upon a false charge,

and further did wilfully imprison and charge him with criminal violations, and further did wilfully cause him to be tried, and further did wilfully deprive him of a fair trial, knowing him to be innocent, and did thereby wilfully deprive George W. Ratterman of rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United States; that is to say, the right not to be deprived of liberty without due process of law; the right to be free from arrest by an officer acting arbitrarily and without legal justification or cause, and the right not to be denied the equal protection of the laws.

All in violation of Title 18, United States Code, § 242 and § 2.

Opinion of the Sixth Circuit.

Nos. 16093-16094,
United States Court of Appeals,
for the Sixth Circuit.

United States of America, Appellee, v. Charles E. Lester and Edward Anthony Buccieri, Appellants.	Appeals from the United States District Court for the Eastern District of Kentucky.

Decided July 8, 1966.

Before: O'Sullivan and Phillips, Circuit Judges and Mathes, Senior District Judge.*

Mathes, Senior District Judge. Charles E. Lester and Edward Anthony Buccieri appeal from the judgment

* William C. Mathes, Senior District Judge of the Southern District of California, sitting by designation.

entered upon a jury verdict finding them guilty as charged, in count one of an indictment, which alleged that appellants and another private citizen, one Carinci, conspired together and with three members of the police force of Newport, Kentucky, to commit an offense against the laws of the United States, in violation of 18 U. S. C., § 371.

The offense averred to be the object of this conspiracy was to violate 18 U. S. C., § 242 by willfully depriving one George W. Ratterman, under color of State law, "of rights, privileges and immunities secured to him and protected by the Fourteenth Amendment to the Constitution of the United (Op. page 2) States; namely, the right not to be deprived of liberty without due process of law, the right to be free from arrest by an officer acting . . . without legal justification . . . and the right not to be denied the equal protection of the law." It is further alleged in the indictment that: "It was the plan and purpose of the conspiracy that [the three defendant police officers] . . ., while acting . . . under color of law, would arrest and imprison George W. Ratterman, charge him with a violation of law, and cause his conviction, all knowing him to be innocent."

In count two of the indictment, the police officers were accused of the commission of the substantive offense which was the asserted object of the conspiracy; while appellants and Carinci were charged with aiding and abetting the police officers in their violation of 18 U. S. C., § 242. The jury convicted both appellants of the conspiracy charged in count one, but acquitted them of the substantive offense charged in count two. All other defendants, including the three police officers, were acquitted by jury verdict of all charges—both the conspiracy and the substantive offense.

As grounds for reversal of their conviction on the conspiracy count, appellants contend: (1) that the evidence

was insufficient to support the conviction; (2) that in giving the jury an instruction which included reference to "persons unknown," the trial court committed prejudicial error; (3) that the trial court likewise erred in refusing to instruct the jury: "Unless you find from the evidence that one or more of the . . . [police officers] were acting under color of law and guilty of the alleged charges . . ., then the law is for the defendant, . . . Lester, and you shall so find . . ."; and (4) that since the police officers were acquitted on both counts, appellants' motion after verdict for judgment of acquittal, pursuant to Rule 29 (b) of the Federal Rules of Criminal Procedure, should have been granted. We shall deal with each of these contentions seriatim.

(Op. page 3) In determining whether the evidence of guilt was sufficient to sustain the verdict, it is worth recalling that "the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." [**Glasser v. United States**, 315 U. S. 60, 80 (1942).]

The evidence, direct and circumstantial, in the case at bar, together with the inferences which the jury could reasonably have drawn therefrom, combined to warrant the jury in finding *inter alia* the following facts: The Glenn-Tropicana, a combination nightclub and hotel in Newport, Kentucky, across the Ohio River from Cincinnati, had been favored for many years with somewhat-less-than-vigorous enforcement of the State laws prohibiting gambling and prostitution. In April of 1961, upon the announcement of George W. Ratterman as a "reform" candidate for sheriff, defendant Carinci, a co-proprietor of the Glenn-Tropicana, telephoned one Thomas Paisley and asked him to arrange a meeting for Carinci with Ratterman.

A few days later, on April 14, appellant Lester, attorney for the Glenn-Tropicana, telephoned a Newport pho-

tographer and asked him to talk to appellant Buccieri, another co-proprietor of the Glenn-Tropicana, about a picture. In due course, the photographer contacted Buccieri who told the photographer that his services would be needed "to take a picture of a man and a woman in a room"; and added the assurance: "Now, don't worry about anything, we will protect you." The photographer gave Buccieri a telephone number where he could be reached at night.

On May 8, 1961, Paisley came to Cincinnati and had cocktails and dinner with Ratterman, commencing at about 5:45 in the afternoon, following which they met with Carinci at a Cincinnati restaurant. After consuming several drinks in the course of the evening, Ratterman and Carinci and Paisley went over to the Glenn-Tropicana for supper. Upon their arrival about 1:30 A. M., Ratterman and Paisley were ushered into Glenn-Tropicana's suite 314 on the third floor, near which **(Op. page 4)** an illegal gambling operation was regularly conducted. Appellant Buccieri then sent Rita Desmond, one of the club's showgirls, upstairs to suite 314 to have a drink with Paisley and Ratterman. Shortly after Rita arrived, Ratterman, who was extremely drowsy by now, left the sitting room of the suite and lay down in an adjoining bedroom.

Carinci next directed April Flowers, another of the Glenn-Tropicana's showgirls, to stop her striptease act and go at once to suite 314 without bothering to change her costume. When April arrived, she was asked by Rita to go into the bedroom and try to awaken Ratterman. April did so, but her efforts failed to arouse Ratterman. Carinci then came to suite 314 and requested Rita and Paisley to go elsewhere in the club with him, leaving April and Ratterman alone in the bedroom of 314.

Meanwhile, approximately ten minutes after Ratterman had arrived at the Glenn-Tropicana, someone called the

photographer's home, and left word for him to call Buccieri at the club. However, the photographer did not return the call. At 2:20 A. M., the gambling operations on the third floor were closed substantially earlier than usual, and the patrons were asked to leave the third floor.

At 2:32 A. M., an anonymous phone call was received at the Newport police station for one of the defendant police officers, who was told: "If you want to get George Ratterman, he is in Room 314 of the Glenn Hotel." The three defendant officers thereupon went to the Glenn-Tropicana at 2:35 A. M., where they first arrested Carinci, and then April Flowers as she emerged from the bedroom of suite 314. That done, there followed a brief scuffle between the police officers and Ratterman, and the latter was taken into custody, wrapped in a bedspread. Testimony by the police officers that he was found with his trousers off was disputed by Ratterman, who said that his trousers had been removed from him by the officers.

(Op. page 5) Appellant Lester promptly arrived at the police station, after having called a bondsman who posted bail for April Flowers and Carinci, but refused to provide bail for Ratterman. Appellant Lester admitted that he had been up since 2:00 A. M., "when the Ratterman deal broke"—well more than a half hour before the arrests occurred. At approximately 4:00 A. M. following the arrests, all six persons accused in the indictment—including the three police officers—were seen together at the Glenn-Tropicana, and at the Flamingo Club an hour later.

Examination of Ratterman the following day disclosed traces of from three to four grams of chloral hydrate ["knockout drops"] estimated to have been ingested between 10:00 and 11:00 P. M. the previous evening.

Since the jury acquitted all the accused of the substantive offense charged in count two of the indictment, it

would serve no useful purpose to recount here the evidence dealing particularly with that offense; other than perhaps to record that the police-court case against Ratterman was dismissed after his attorney was able to produce the photographer, whose account of the efforts to have him take a picture of the planned bedroom scene persuaded the City Attorney of Newport that the affair was a sham.

There was ample evidence to sustain the conviction of both appellants on the conspiracy count. Indeed, we must say that the evidence was ample to sustain a conviction of all defendants on both counts.

Turning now to appellants' objections to the instructions given to the jury, the record discloses, as appellants point out, that the District Court instructed the jury in the language of the indictment at one point during the charge and, in so doing, did say that if the jury should believe beyond a reasonable doubt that the six defendants named in the conspiracy count had conspired with each other "and with other persons to the grand jury unknown", as charged, the defendants could be found guilty. But the District Judge went on to make it **(Op. page 6)** crystal clear that only the six named defendants were involved under the evidence in the case, by further instructing the jury that: "[T]he conspiracy charged in the first count . . . is a charge that these six defendants agreed among themselves to commit the unlawful act . . ."

Moreover, no objection to the mention of "persons unknown" was made at the trial [see Fed. R. Crim. P. 30] and, considering the instructions as a whole, the reference to "persons unknown" of which appellants complain could not have adversely affected any of their substantial rights [see: Fed. R. Crim. P. 52 (b); **United States v. Walker**, 313 F. 2d 236, 241 (6th Cir. 1963); **Conley v. United States**, 257 F. 2d 141, 144 (6th Cir. 1958)].

The gist of appellants' argument in support of their remaining contentions rests upon the assumption that since they as private citizens, were incapable of acting "under color of law," and hence were incapable of the offense defined in 18 U. S. C., § 242, they could not be guilty of conspiring to commit that offense in violation of 18 U. S. C., § 371. [**Cf.: United States v. Price**, . . . U. S. . . . (3/28/66), 34 Law Week 4313; **United States v. Guest**, . . . U. S. . . . (3/28/66) 34 Law Week 4323.]

This argument misconceives the function of 18 U. S. C., § 2, which provides that:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal. [and]
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States is punishable as a principal." [Italics added.]

In keeping with the provisions of § 2, it has long been held that an indictment need not specifically charge "aiding and abetting" or "causing" the commission of an offense against the United States, in order to support a jury verdict based upon a finding of either. All indictments must be read in **(Op. page 7)** effect, then as if the alternatives provided by 18 U. S. C., § 2, were embodied in each count thereof. [See: **Nye & Nisson v. United States**, 336 U. S. 613, 619 (1949); **Remus v. United States**, 291 Fed. 513 (6th Cir. 1923); cf. Fed. R. Crim. P. 7 (c).]

In the case at bar, therefore, both the indictment and the verdict must be read in light of the acquittal of the police officers, as if it were alleged, and the jury had found, that appellants had conspired willfully to "cause" innocent police officers to act "under color of law" to deprive Ratterman of his civil rights, in contravention of 18 U. S. C., § 371. [See **Pereira v. United States**, 347 U. S. 1 (1954).]

To this appellants would reply that since it is one of the essential elements of the offense defined in 18 U. S. C., § 242, that the act depriving a person of his "civil rights" be done "under color of law", and appellants were incapable of acting under "color of law", they may not be convicted of conspiring, in violation of 18 U. S. C., § 371, to cause innocent agents, who do have such capacity, to commit acts denounced by 18 U. S. C., § 242.

The short answer to this argument is that it was of doubtful enough validity prior to the 1951 amendment of 18 U. S. C., § 2 (b), and can have no possible validity since that amendment. [See 65 Stat. 717 (1951).] For it was held long ago that even though "a defendant was incompetent to commit the offense as principal by reason of not being of a particular age, sex, condition, or class, he may, nevertheless, be punished as a procurer or abettor." [**United States v. Snyder**, 14 Fed. 554, 556 (C. C. D. Minn. 1882).]

This doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as **Regina v. Saunders**, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per se alium facit per se*, at least as early as the 14th century. [See: **United States v. Gooding**, 25 U. S. (12 Wheat.) 460 (1827); **Sayre, Criminal Responsibility for the Acts of Another**, 43 Harv. L. Rev. 689 (1930).]

(Op. page 8) Although a literal reading of the predecessor of present 18 U. S. C., § 2 (b), only made punishable as principal one who willfully caused an act to be done "which if directly performed by him" would be an offense against the United States [62 Stat. 684 (1948)], it was declared that a person incapable of committing a particular offense against the United States was nonetheless punishable as a principal, if he willfully caused an innocent person, capable of doing so, to commit the proscribed act.

[See **United States v. Selph**, 82 F. Supp. 56 (S. D. Calif. 1949) **cf. Boushea v. United States**, 173 F. 2d 131 (8th Cir. 1949).] This view as to the scope of § 2 (b) is buttressed by the fact that in 1951 the Congress, as if in anticipation of appellants' argument here, amended the above-quoted phrase of § 2 (b) to read: "which if directly performed by him *or another*". [65 Stat. 717 (1951); italics added.] The Congressional purpose in enacting this amendment was "to . . . make certain the intent to punish [persons embraced within § 2] . . ., regardless of the fact that they may be incapable of committing the specific violation . . ." [1951 U . S. Code Cong. Service 2578, 2583.]

It has been beyond controversy, then at least since the 1951 amendment to 18 U. S. C., § 2 (b), that the accused may be convicted as causer, even though not legally capable of personally committing the act forbidden by a Federal statute, and even though the agent willfully caused to do the criminal act is himself guiltless of any crime. [See: **United States v. Inciso**, 292 F. 2d 374 (7th Cir. 1961); **United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle**, 250 F. Supp. 412 (N. D. Tex. 1966).]

Finally, it is said that since acquittal of the police officers negatives any contention that they acted "willfully", it was impossible for appellants as civilians to commit the conspiracy offense of which they stand convicted. [See **Screws v. United States**, 325 U. S. 91 (1945).] True it is, of course, that criminal intent is an essential element of each crime charged in the indictment; indeed an essential element of every felony.

(Op. page 9) It is but to quote the hornbook to say that in every crime there must exist a union or joint operation of act, or failure to act, and intent. However, this is far from suggesting that the essential element of criminal intent must always reside in the person who does the forbidden act. Indeed, the latter may act without any criminal

intent whatever, while the *mens rea*—"willfulness"—may reside in a person wholly incapable of committing the forbidden act. When such is the case, as at bar, the "joint operation of act and intent" prerequisite to commission of the crime is provided by the person who willfully causes the innocent actor to commit the illegal act. And in such a case, of course, only the person who willfully causes the forbidden act to be done is guilty of the crime.

We can perceive no basis in reason or policy to distinguish a case of willfully causing innocent police officers, "acting under color of law", to deprive another of his civil rights, from a case of willfully causing an innocent bank clerk to mail a fraudulently obtained check [**Pereira v. United States**, *supra*, 347 U. S. 1], or causing a lender to make a false report of prices paid for homes [**United States v. Selph**, *supra*, 82 F. Supp. 564], or causing a union representative to receive money unlawfully from employers [**United States v. Inciso**, *supra*, 292 F. 2d 374], or causing a licensed dealer in firearms to fail to maintain required records [**United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle**, *supra*, 250 F. Supp. 410].

Nor do we discern any rationale for refusing, as appellants suggest, to apply the conspiracy statute [18 U. S. C., §371] to crimes made punishable by 18 U. S. C., § 2 (b). So long as anyone who "willfully causes an act to be done" which, "if directly performed by him or another would be an offense against the United States", is punishable as a principal, it follows *a fortiori* that when two or more persons conspire willfully to "cause" an act forbidden by § 2 (b), they *ex necessitate* conspire to "commit [an] offense against the United States" within the meaning of 18 U. S. C., § 371.

We read the charge in its entirety and find that the trial judge adequately instructed the jury that, under the

evidence **(Op. page 10)** in the case, appellants could properly be convicted of conspiring willfully to cause the police officers, acting "under color of law", to deprive Ratterman of his civil rights.

Of no consequence here is the fact that one reading the record before us might find it difficult, perhaps even impossible, to comprehend how the jury could have acquitted all the police officers of the conspiracy offense. It is not the province of the Court to inquire by what course of reasoning the jury may have reached seemingly inconsistent verdicts. Inconsistency of verdicts as to various defendants in a particular case has always been an exclusive prerogative of the jury. [See: **United States v. Dotterweich**, 320 U. S. 277, 279 (1943); **Lazarov v. United States**, 225 F. 2d 319 (6th Cir. 1955); **United States v. Austin Bagley Corp.**, 31 F. 2d 229 (2d Cir. 1929); **cf. Dunn v. United States**, 284 U. S. 390 (1932); **Grant v. United States**, 255 F. 2d 341, 342 (6th Cir. 1958).]

By acquitting the police officers, while convicting appellants of the conspiracy offense, the jury necessarily found that appellants conspired willfully to cause the police officers to act "under color of law" and, while so acting, to make an unlawful arrest of Ratterman, and attempt to bring about a false conviction—all as charged in the conspiracy count of the indictment.

We hold that the evidence in the case fully supports this verdict.

Appellants were fairly tried and fairly convicted. The judgment of the District Court is affirmed.

O'Sullivan, Circuit Judge, dissenting. I am unable to agree with my brothers of the majority.

Count I, under which appellants Lester and Buccieri were convicted, charged that they conspired with the Newport police officer Ciafardini and others to have the

latter "while acting in their official capacity * * * **wilfully** deprive George W. Ratterman * * * of the right to be free from arrest by an officer **acting arbitrarily** and without legal justification of **(Op. page 11)** cause" and further that the plan of the conspiracy was to have Ciafardini and the other officers arrest Ratterman, charge him with a violation of law and cause his conviction "all knowing him to be innocent."

I read this to mean that appellants conspired with the officers to have these officers **wilfully, arbitrarily** and **without legal justification** arrest Ratterman, even though the officers knew that he had done nothing to warrant such arrest. But the jury found that no such plan was carried out, nor had the officers, the alleged co-conspirators, ever so conspired with appellants.

The government, faced with the jury's verdict acquitting the officers of all misconduct, changes the charge of the indictment to a plan by appellants to have the officers arrest Ratterman not **wilfully and arbitrarily**, but innocently. Its brief to us states the government's position on appeal as follows:

> "Accepting the verdict of the jury on its face, it represented a finding that appellants conspired together to deprive Ratterman of his civil rights by causing the police, **as their innocent dupes**, to make an unwarranted arrest of George Ratterman." (Emphasis supplied.)

That, however, is not what the indictment charged. Neither was such a case submitted for the jury's decision. But, even assuming the government's right to assert such a theory, their reasoning will not support the convictions.

Another way of reciting the government's position is to characterize appellants' plan as one to create a situation which would cause police officers, acting innocently and

with apparent cause therefor, to make an arrest. Such a plan, however, would not contemplate the accomplishment of a violation of § 242, because to be guilty of such violation it would be necessary that the officers, acting under color of law, "wilfully" subject Ratterman to the deprivation charged. This is not to say that the plan had to be carried out, because 18 **(Op. page 12)** U. S. C., § 371 would be offended by a conspiracy "to **commit** any offense against the United States." However, a § 371 conspiracy must include a plan to have someone "commit an offense against the United States." The only "offense against the United States" which is charged as the subject of the conspiracy is a violation of § 242, which forbids the deprivation "under color of law * * * of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." Since Ratterman had no right to be free from arrest on probable, though erroneous, cause, the alleged scheme of Buccieri and Lester to create a sham which would lead the officers to innocently arrest Ratterman was not a plan or conspiracy to bring about the commission of this "offense against the United States." Such conduct would indeed be despicable and constitute a crime punishable under the Kentucky statute,[1] but would not add up to the federal offense charged. If the conspiracy was to have the officers, as dupes and acting innocently, arrest Ratterman, it was not a conspiracy to cause a violation of § 242.

I am quite aware of the obviously correct rule that it was not necessary that Buccieri or Lester be themselves capable of committing the substantive offense. **United States v. Inciso**, 292 F. (2) 374 (CA 7, 1961) **cert. den.** 368

[1] K. R. S. § 437.150 **Conspiracy to carry on false prosecution.** Any persons who conspire, confederate or bind themselves by oath, covenant or agreement, maliciously to aid one another to carry on or institute a false prosecution in the name of the state against any other person shall be fined one hundred dollars or imprisoned for twelve months, or both.

U. S. 920; **Brown v. United States**, 204 F. (2) 247, 250 (CA 6, 1953); **United States v. Ramey**, 336 F. (2) 512, 514 (CA 4, 1964); **Culp v. United States**, 131 F. (2) 93, 99 (CA 8, 1942). I find no case, however, holding that a person can be guilty of a § 371 conspiracy where the alleged plan involves no one capable of committing the proscribed act. The officers, as long as they were innocent dupes, could not arrest Ratterman **wilfully** and **without probable cause**; the appellants, as civilians, could not, acting under color of law, arrest Ratterman at all.

(Op. page 13) The government seeks to support its position by the language of 18 U. S. C., § 2 (b), which is as follows:

> "Whoever **causes an act** to be done **which** if directly performed by him or another **would be an offense against the United States**, is punishable as a principal." (Emphasis supplied.)

This is merely a codification of the familiar common-law principal, discussed by the majority, that if I make another person my unwitting tool, I am equally guilty as if I had acted directly. I at once repeat, however, that the jury acquitted the appellants as well as the police officers of Count II which charged the officers with the substantive offense and the appellants with aiding and abetting them. The jury's verdict can mean only that the offense described in § 242 was not committed. Therefore, no one **caused** "an act **to be done**" which was "an offense against the United States." The government says that if the appellants conspired to cause "an act to be done" which if performed by another (here the police officers), "would be an offense against the United States" (18 U. S. C., § 2 (b)), they were guilty of a conspiracy condemned by § 371. I agree, but the essential ingredient lacking here is the plan to have the "another" commit an "offense against the United States." Further, this

case would not even be an appropriate one for the appellee's suggested analysis. Section 242 interposes the federal government between the private citizen and the oppressive exercise of state power. The very vice at which the statute is aimed is the conjunction of evil motive and state power in the offender. Absent this, there is no reason why the federal statute should, or could, be employed.

I recognize that to sustain the conviction of appellants we need not find rationality in the jury's acquittal of the officers and its conviction of appellants. **United States v. Austin-Bagley Corporation**, 31 F. (2) 229, 233 (C. A. 2, 1929); **Grant v. United States**, 255 F. (2) 341, 342 (C. A. 6, 1958). Neither of **(Op. page 14)** these cases, however, dealt with the statute before us, § 242, which requires the confluence of special capacity—"color of law," and malevolent "wilfulness" as prerequisites to the crime. As Judge Learned Hand pointed out in **United States v. Austin-Bagley Corp.**, 31 F. (2) 229, 233 (C. A. 2, 1929): "The verdict must not itself deny the existence of the essential facts". I consider that the jury's verdict acquitting the officers did "deny the existence of [one of] the essential facts," viz: a violation of § 242 or a plan to cause such a violation.

The government speculates that the jury's exoneration of the police officers did not necessarily exhibit a conviction that they were actually innocent of the charged conspiracy. The appellee's brief says,

> "For example, at the time of the trial one of the officers had been made Chief of Police, the jury might well have felt that his conviction, along with that of two other long-time members of the force, for an event which occurred two years in the past, might have a deleterious effect on the morale of the community, * * *. Alternatively, the jury might have

been impressed with the presence of the officers' families in the courtroom."

However, such an argument carries the government too far since its reasoning would equally compel the abandonment of the long established rule that a jury may not convict only one of two or more alleged conspirators and exonerate those with whom the convicted one is said to have conspired. The rationale of this rule has been that with the acquittal of the other alleged conspirators, the possibility of establishing one of the "essential facts" of the conspiracy, i. e., the existence of two people who could have agreed, disappears. **Cf. United States v. Austin-Bagley,** *supra*, p. 233, and see also cases collected in Annos. 72 A. L. R. 1180, 1182, 1186; 91 A. L. R. (2) 700, 705. The Supreme Court of Tennessee took an analogous position in **DeWees v. State,** 390 S. W. (2) 241, 244 **(Op. page 15)** (Tenn. 1965), where it held that the acquittal of the only conspirator charged with committing an overt act required the dismissal of all alleged conspirators. Since the jury's verdict denied an "essential fact," i. e., the performance of an overt act by one of the conspirators, the conspiracy charge could not stand. The Tennessee court held that this was so notwithstanding that there was sufficient evidence to support a guilty verdict as to all the conspirators had the jury so found. See also **Herman v. United States,** 289 F. (2) 362, 368-369 (C. A. 5, 1961). I am aware of the generality that the acquittal of some members of a charged conspiracy does not necessarily forbid conviction of others. **Baxter v. United States,** 45 F. (2) 487, 489 (C. A. 6, 1930); **Langley v. United States,** 8 F. (2) 815, 819 (C. A. 6, 1925), and see Anno. 91 A. L. R. (2) 700, 713. But such general rule is not controlling here.

The government's brief exposes its position by the assertion that "In the case at bar, we are assuming that the officers **were not involved.**" Inasmuch as there was

no direct evidence of a conspiracy between appellants and the officers, the existence of it has to be inferred from what the officers did. But the jury found that the officers neither acted in violation of § 242 nor conspired to do so. Assuming a conspiracy between Buccieri and Lester to use the officers to act as **innocent dupes**, the direction of such conspiracy did not contemplate anyone violating § 242.

While they do not deal directly with the question before us, I consider that the United States Supreme Court decisions in **United States v. Price, et al.**, ... U. S. ... (Mar. 28, 1966) (Nos. 59 and 60, Oct. Term, 1965), and **United States v. Guest**, ... U. S. ... (Mar. 28, 1966) (No. 65, Oct. Term, 1965), support the view that a charge that civilians conspired to violate § 242 would not be sufficient, absent a charge of conspiracy or connivance by state agents. In **Guest**, which dealt with the parallel § 241, the Supreme Court held the indictment's charge was good as against a challenge that it involved "wholly private action". The Court said,

> **(Op. page 16)** "The allegation is broad enough to cover a charge of active connivance by agents of the state * * * amounting to official discrimination."

and then went on to observe that,

> "Although it is possible that a bill of particulars, or the proofs if the case goes to trial, would disclose no cooperative action of that kind by officials of the state, the allegation is enough to prevent dismissal of this branch of the indictment" (... U. S. ...).

I cannot infer from this otherwise than that a lack of an allegation or proof of "connivance by agents of the state" would vitiate a conviction of violation of § 241 and that such view would apply as well to a § 242 charge. That such was the direction of the majority of

the court in **Guest** is emphasized by the partial dissent where Mr. Justice Brennan expresses his understanding of the majority holding.

> "I understand this to mean that no matter how compelling the proofs that private conspirators murdered, assaulted, or intimidated Negroes * * * the prosecution under the second numbered paragraph must fail, in the absence of proofs of active connivance of law enforcement officers with private conspirators in causing the false arrests" (... U. S. ...).

I have studied the many other authorities cited in the briefs before us. I do not discuss them because they do not provide clear precedential guidance.[2] It will be sufficient to say that **(Op. page 17)**, in my view, the statements therein which appear to give surface support to the government's position are inapposite because of their differing factual contexts. None deal relevantly with the special character of § 242 which permits the federal government to punish conduct normally punishable as a state matter when such conduct can be viewed as state action violative of the guarantees of the Fourteenth Amendment. I, therefore, write in dissent on the basis of the unambiguous language of the statutes involved.

I regret that I cannot join in sustaining the convictions of appellants. Appellants denied that they were the

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[2] Among others, **Gebardi v. United States**, 287 U. S. 112; **Parr v. United States**, 363 U. S. 370; **United States v. Holte**, 236 U. S. 140, 144; **Berger v. United States**, 295 U. S. 78, 81; **Boushea v. United States**, 173 F. (2) 131 (C. A. 8, 1949); **Kaufman v. United States**, 212 Fed. 613 (C. C. A. 2, 1914); **Cohen v. United States**, 157 Fed. 651 (C. C. A. 2, 1907); **Lazarov v. United States**, 225 F. (2) 319, 321 (C. A. 6, 1955); **Joyce v. United States**, 153 F. (2) 364, cert. den. 328 U. S. 860; **United States v. General Motors**, 121 F. (2) 376, 411 (C. A. 7, 1941); **American Medical Ass'n v. United States**, 130 F. (2) 233, 253 (C. A. D. C. 1942); **United States v. Selph**, 82 F. Supp. 56, 58, 59 (D. C. S. D. Cal., 1949); **Kaplan v. United States**, 7 F. (2) 594, 596 (C. A. 2, 1925); **Dunn v. United States**, 284 U. S. 390.

authors of Ratterman's arrest and charged that his consumption of Scotch whiskey and a willing approach to the lady known as April Flowers brought on his woe. But there was abundant evidence from which the jury could find that they wickedly conspired to disgrace Ratterman; that Lester, as a lawyer, suborned perjury; and that both, by malicious artifice, led the officers to arrest the innocent Ratterman. Such conduct would clearly offend state criminal statutes. Dealing with a like situation, the United States Supreme Court in **Parr v. United States**, 363 U. S. 370, 393, 394, said,

> "The strongest element in the government's case is that petitioner's behavior was shown to have been so bad and brazen which coupled with the inability or at least the failure of the state authorities to bring them to justice, doubtless persuaded the government to undertake this prosecution. But the showing, however convincing, that state crimes * * * were committed does not establish the federal crime * * * and under our vaunted legal system no man however bad his behavior, may be convicted of a crime of which he was not charged, **proven and found guilty in accordance with due process.**" (Emphasis supplied.)

I would reverse the judgment of the District Court with direction to acquit and discharge the appellants.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	1
Statement	2
Argument	3
Conclusion	7
	11

CITATIONS

Cases:	
Boushea v. *United States*, 173 F. 2d 131	8
Cohen v. *U.S.*, 157 Fed. 2d 651	8
Screws v. *U.S.*, 325 U.S. 91	10
United States v. *Gooding*, 12 Wheat. 460	7
United States v. *Guest*, 383 U.S. 745	9
United States v. *Inciso*, 292 F. 2d 374, certiorari denied, 368 U.S. 920	8
United States v. *Kaufman*, 212 Fed. 2d 613	8
United States v. *Price*, 383 U.S. 787	7, 9
United States v. *Selph*, 82 F. Supp. 56	8
Constitution, statutes:	
Constitution of the United States, Fourteenth Amendment	3
Act of March 4, 1909, 35 Stat. 1092, Section 20, derived from R.S. 5510	8
18 U.S.C. 2(b)	8, 9
18 U.S.C. 241	9
18 U.S.C. 242	2, 3, 7, 8, 9
18 U.S.C. 371	2, 3
Labor Management Relations Act, § 302(b), 29 U.S.C. 186(b)	8

Miscellaneous:

	Page
1 Chitty, *Criminal Law* (5th ed. 1847), p. 256a	7
1 Wharton, *Criminal Law and Procedure* (1957), § 106, pp. 230-231	7
S. Rep. No. 1020, 82d Cong., 1st Sess	8

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 666

CHARLES E. LESTER AND EDWARD ANTHONY BUCCIERI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 363 F. 2d 68.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1966. A petition for rehearing was denied on September 15, 1966. The petition for a writ of certiorari was filed on October 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' convictions for conspiracy to deprive a person of his civil rights should have been

set aside because the jury acquitted the State police officers involved in the alleged conspiracy.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> Conspiracy to commit offense or to defraud United States—
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 242 provides:

> Deprivation of rights under color of law—
>
> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioners and one Carinci were indicted in the United States District Court for the Eastern District of Kentucky for conspiring, in violation of 18 U.S.C. 371, with three Newport, Kentucky police officers to violate 18 U.S.C. 242, and for aiding and abetting the officers to commit the substantive offense. After trial by jury, petitioners were convicted on the conspiracy count and acquitted on the substantive count. The police officers and Carinci were acquitted on all counts. On August 6, 1963, each of the petitioners was sentenced to imprisonment for 12 months (A. App. 9a–11a).[1] The court of appeals, one judge dissenting, affirmed (Pet. 59).

The count of the indictment upon which petitioners were convicted charged a conspiracy by which the police officers, while acting in their official capacities and under color of laws of the State, would wilfully deprive one George W. Ratterman of the rights, privileges and immunities secured to him and protected by the Fourteenth Amendment—namely, the right not to be deprived of liberty without due process of law, the right to be free from arrest by an officer acting arbitrarily and without legal justification, and the right to the equal protection of the law (see Pet. 57–58). The government's evidence showed the following.

Early in 1961 a Campbell County, Kentucky citizens' reform committee, concerned about vice and

[1] "A. App." refers to the appellants' appendix in the court below, "G. App." to the government's appendix.

corruption in the city of Newport, sought to fill the office of county sheriff with a well-known athlete and attorney, George W. Ratterman (G. App. 46b–54b; 36b–37b). At the time, the petitioner Buccieri was the manager of the gambling casino of the Glenn-Tropicana, a Newport night club and hotel; petitioner Lester was the club's attorney; and co-defendant Carinci was corporate president (A. App. 155a–158a; G. App. 108b). On April 5, the day of the announcement of Ratterman's candidacy, Carinci asked an acquaintance to arrange a meeting for him with Ratterman (G. App. 2b–7b). A few days later petitioner Lester telephoned a Newport photographer and directed him to meet with Buccieri to discuss a picture. When the photographer complied, Buccieri told him that "he wanted me to take a picture of a man and a woman in a room" and that the photographer was to "jump in and take the photograph and then jump out." Buccieri assured him, "Now, don't worry about anything we will protect you." (A. App. 40a.) The photographer left with Buccieri a telephone number where he could be reached at night (A. App. 34–44a).

On the evening of May 8, the scheduled meeting between Ratterman, Carinci and an acquaintance took place in a Cincinnati restaurant (G. App. 62b–65b). At about 1:30 a.m. Ratterman was ushered into suite 314 of the Glenn-Tropicana. Almost immediately Buccieri sent a club showgirl to the suite to have a drink (G. App. 43b). Ratterman, then feeling uncontrollably drowsy (and having no recollection of having entered the hotel), left the sitting room of the

suite and lay down in the adjoining bedroom (G. App. 66b–67b). At about this time the club's featured striptease artist, April Flowers, was directed to cut her performance short and report immediately to the suite in costume. There she was instructed, but was unable, to awaken Ratterman. She was left in the bedroom alone with him (G. App. 84b–94b).

Meanwhile, some ten minutes after Ratterman had been taken to Glenn-Tropicana, a male caller telephoned the photographer's home, told his wife that he had to have a picture taken "right away" (G. App. 17b), and asked her to have her husband call Buccieri at the club. The wife did not deliver the message and refused to answer the subsequent rings of the telephone (G. App. 17b–19b).

At 2:20 a.m., gambling operations near suite 314 were closed earlier than usual and patrons asked to leave (G. App. 89b–90b).

At 2:32 a.m. a male caller telephoned the Newport police station and asked to speak to one of the defendant officers (G. App. 24b–26b), who subsequently reported that an anonymous voice had said, "If you want to get George Ratterman, he is in Room 314 of the Glenn Hotel" (G. App. 42b). The three defendant officers rushed immediately to the club, where they arrested Carinci and April Flowers, and, after a brief scuffle, took Ratterman into custody wrapped in a bedspread (G. App. 95b–98b). Ratterman testified that the officers, who had reported finding him with his trousers off, actually had torn the trousers from him at this time (G. App. 68b).

At the police station petitioner Lester arrived, having contacted a bondsman who posted bail for April Flowers and Carinci but who refused to post bail for Ratterman (G. App. 31b–32b; 40b). At approximately 4 a.m. that morning petitioners, Carinci and the three defendant police officers were seen together at the Tropicana and later at another club (G. App. 105b–106b).

On the following day, a physical examination of Ratterman, arranged by his family doctor, revealed traces of from 3 to 4 grams of chloral hydrate ("knock-out drops") estimated to have been ingested between 10 and 11 o'clock the previous evening (G. App. 101b–105b).

A lawyer who represented the city of Newport in a subsequent criminal prosecution against Ratterman testified that petitioner Lester told him that April Flowers would testify that Ratterman made an approach to her. Lester gave the attorney a pen (bearing Ratterman's name and phone number) which Lester said Ratterman had given Miss Flowers. The prosecutor said that he moved to dismiss the case against Ratterman during trial, over the protest of Lester, after hearing the testimony of the photographer (see A. App. 90a, *et seq.*). April Flowers testified that Lester had produced the pen and that she, under instructions from Lester, had testified falsely at the local prosecution that Ratterman had given it to her (A. App. 112a–113a). She also testified that at the time she had seen Ratterman on the night in question, he had been fully clothed (G. App. 95b),

and that at the local trial she had lied about this and an alleged approach. She had been told by Buccieri and Carinci to go along with the police if she "wanted to stay healthy" (G. App. 101b; A. App. 114a).

ARGUMENT

Petitioners concede that private citizens may properly be indicted for conspiring with State officers to deprive an individual of his civil rights under color of law, in violation of 18 U.S.C. 242. See *United States* v. *Price*, 383 U.S. 787. They concede, too, that if the State officers themselves had done, or had agreed to do, what the jury found petitioners planned—institute a prosecution based on fabricated evidence which had been created for the specific purpose of bringing about the arrest and trial of Ratterman—their conduct would have violated Section 242. The only question is thus whether it is possible for private persons to commit an offense under 18 U.S.C. 242 by wilfully causing *innocent* police officers (that being the jury's verdict) to act under color of law to deprive an individual of his civil rights.[2] We believe so.

It has long been settled that, acting through an innocent instrumentality, one may commit an offense that he could not commit directly.[3] Accordingly, 18

[2] If the substantive offense can thus be committed by one or more private persons, then, clearly, an agreement to commit such offense is an unlawful conspiracy under 18 U.S.C. 371 whether or not the plan succeeds and the substantive offense occurs.

[3] See *United States* v. *Gooding*, 12 Wheat. 460; 1 Chitty, *Criminal Law* (5th ed., 1847), p. 256a; 1 Wharton, *Criminal Law and Procedure* (1957), § 106, pp. 230–231.

U.S.C. 2(b) provides that "[w]hoever wilfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States, is punishable as a principal." (Emphasis added.) The underscored language was included precisely "to * * * make certain the intent to punish [persons under Section 2] regardless of the fact that they may be incapable of committing the specific violation." S. Rep. No. 1020, 82d Cong., 1st Sess., p. 7. Thus, in *United States* v. *Inciso*, 292 F. 2d 374, certiorari denied, 368 U.S. 920, the Seventh Circuit affirmed the conviction of a defendant who was not himself charged with being a "representative" within the prohibition of Section 302(b) of the Labor Management Relations Act (29 U.S.C. 186(b)), but was charged, rather, with "causing" such a representative (a labor union not indicted, or charged with acting wilfully) to receive money from employers. And even before the enactment of 18 U.S.C. 2(b) in its present form federal courts had held that defendants could properly be charged as principals for causing innocent agents to submit false papers in violation of federal statutes that the defendants could not themselves have violated.[4]

---

[4] See *Boushea* v. *United States*, 173 F. 2d 131 (C.A. 8); *United States* v. *Selph*, 82 F. Supp. 56 (S.D. Cal.); see, also, *Cohen* v. *United States*, 157 Fed. 2d 651 (C.A. 2) (persons not bankrupt could be guilty of a conspiracy that a bankrupt would conceal its assets, albeit the bankrupt was not and could not be indicted as a conspirator); cf. *United States* v. *Kaufmen*, 212 Fed. 2d 613 (C.A. 2). None of the many decisions cited by petitioners as being in conflict with the instant case (Pet. 9–10) is remotely in point.

These settled principles clearly apply to 18 U.S.C. 242. The section formerly punished one who under color of law "subjects, *or causes to be subjected*, any inhabitant" to the indignities prohibited by its provisions. See Section 20 of the Act of March 4, 1909, 35 Stat. 1092, derived from R.S. 5510 (emphasis added). In the 1948 codification of the criminal code the underscored language was eliminated (along with such phrases as "causes or procures" in other sections of the code) for the sole reason that it was deemed unnecessary in the light of the definition of principal in Section 2(b). (See Reviser's notes.) This history negates petitioners' argument that, because they could not act directly under color of law, they are not punishable under the statute; since any action by officials is of necessity direct action, a "causing" provision would be redundant except as applied to a private individual.

This Court's decisions of last Term dealing with the civil rights statutes do not support petitioners. In *United States* v. *Price*, 383 U.S. 787, the Court held only that private persons charged jointly with State officials with violation of Section 242 were indictable as principals acting under color of law. In *United States* v. *Guest*, 383 U.S. 745, unlike here, private persons *only* were charged with a conspiracy in violation of 18 U.S.C. 241 (a companion statute to 242), and the indictment contained no specific allegation that the private persons had acted under color of law. Yet, a majority of the Court found the indictment sufficient "at least to require the denial of a motion to dismiss," because one means of accomplishing the conspiracy was alleged to be "[b]y

causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." 383 U.S. at 756. To be sure, the separate opinion of Mr. Justice Brennan reads the majority opinion to imply that the prosecution would fail in the absence of proof of the active connivance of State officers, but we do not believe that the majority opinion can be so interpreted, in light of its unequivocal disclaimer of any view on the extent of the State action that must be shown, and its statement that such involvement need not be "exclusive or direct." 383 U.S. at 755.

We stress that here the State involvement was more than peripheral. The crime contemplated the direct use of State power as an essential means to the unlawful purpose, and specific intent to deny constitutional rights was proved. Thus, had petitioners succeeded in utilizing State power, they could have been held accountable as principals. Therefore, they could be guilty of *conspiring* to commit the offense—a charge not dependent on its successful consummation.[5]

---

[5] There is no basis for the concern of the dissenting judge below that every arrest on probable though erroneous cause would amount to a federal offense. The element of specific intent required by this Court's decision in *Screws* v. *United States*, 325 U.S. 91, must be established in every case. The record of this case shows that the instructions in this regard were clearly sufficient. The court read the statute and the indictment to the jury (A. App. 237a, 251a), repeatedly instructed that the jury must find that the defendants agreed to violate Ratterman's civil rights by having him taken into custody without cause (A. App. 236a–237a, 239a), and cautioned that it could not convict unless it found that the offense was committed intentionally and wilfully (A. App. 235a–236a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1966.

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY

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INDEX

	Page
Questions Presented	1
Argument	2
Comment on Cases Cited in Brief for the United States in Opposition	6
Conclusion	10

Citations.

Boushea v. United States, 173 F. 2d 131	6
Cohen v. United States, 157 F. 651	7
Kaufman v. United States, 212 F. 613	7
Pullen v. United States, 164 F. 2d 756	6
Russell v. United States, 369 U. S. 749, 760, 772	5
Screws v. United States, 325 U. S. 91, 89 L. ed. 1495, 162 ALR 1330, 65 S. Ct. 1031	3, 4, 6
United States v. Fabrizio decided December 12, 1966, 35 United States Law Week, 4082-4083	5
United States v. Gooding, 25 U. S. 460, 12 Wheat. 460, 6 L. ed. 693	7
United States v. Inciso, 292 F. 2d 374	9
United States v. Selph, 82 F. Supp. 56	8

Statutes.

18 U. S. C., § 2	2, 7, 8, 9
18 U. S. C., § 242	2, 3, 4, 7, 8, 9
18 U. S. C., § 371	2, 4

Miscellaneous.

1 Chitty, Criminal Law (5th Ed. 1847), p. 256a	9
1 Whaton, Criminal Law and Procedure (1957), Sec. 106, pp. 230-231	8

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UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY

To "Brief for the United States in Opposition."

QUESTIONS PRESENTED.

The questions presented are those appearing at pp. 2-3 of the Petition for Writ of Certiorari.

ARGUMENT.

At p. 7 of Brief of United States in Opposition it is stated:

> "They concede, too, that if the State officers themselves had done, or had agreed to do, what the jury found petitioners planned—institute a prosecution based on fabricated evidence which had been created for the specific purpose of bringing about the arrest and trial of Ratterman—their conduct would have violated Section 242."

Petitioners do not concede anything of the kind.

This quoted statement of the Government's Brief is wholly irrelevant. The state officers (police) did not violate § 242. The police did not agree with petitioners to violate § 242. The police did not agree or conspire with petitioners to do anything. And petitioners did not violate § 242; nor did they violate § 2. So said the jury by its verdict acquitting petitioners upon Count Two which alleged an offense under both § 242 and § 2 and acquitting the police on Count One which alleged a conspiracy under § 371 to violate § 242.

From the erroneous statement of a concession by petitioners, the Government's Brief then continues at p. 7 to put the question:

> "Whether it is possible for private persons to commit an offense under 18 U. S. C. 242 by wilfully causing **innocent** police officers (that being the jury's verdict) to act under color of law to deprive an individual of his civil rights?"

and adopt in a footnote the completely incorrect statement that:

> "if the substantive offense can thus be committed by one or more private persons, then, clearly, an

agreement to commit such offense is an unlawful conspiracy under 18 U. S. C. 371 whether or not the plan succeeds and the substantive offense occurs."

The question for decision is not that stated by the Government. It has no place upon this record. Neither petitioners nor any defendant committed an offense under § 242 and the jury's verdict belies the Government's assertion that petitioners caused innocent police to act under color of law to deprive an individual of his civil rights. The verdict establishes the direct opposite of what the Government now and for the first time contended upon appeal.

The above quoted Footnote 2 from the Government's Brief is an astounding statement. It assumes that a single private person wholly incapable of acting under color of law could commit the offense denounced by 18 U. S. C., § 242, when the statute by its express terms denounces only acts under color of law. If the Government's supposition that one or more private persons wholly incapable of acting under color of law without the interposition of state action can commit the offense denounced by § 242, then there is brought within the statute crimes done by men in general in the ambit of their personal pursuits and if so applied would be constitutionally impermissible under the holding of Screws v. United States, 325 U. S. 91, 89 L. ed. 1495, 162 A. L. R. 1330, 65 S. Ct. 1031, where the Court said:

"As stated in United States v. Cruikshark, 92 U. S. 542, 553, 554, 23 L. ed. 588, 592, 'It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.' And see United States v. Fox, 95 U. S. 670, 672, 24 L. ed. 538, 539. It is

only state action of a 'particular character' that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief. Civil Rights Cases, 109 U. S. 3, 11, 13, 27 L. ed. 836, 839, 840, 3 S. Ct. 18. Thus Congress in § 20 of the Criminal Code did not undertake to make all torts of state officials federal crimes. It brought within § 20 only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

"This section was before us in United States v. Classic, 313 U. S. 299, 326, 85 L. ed. 1368, 1383, 61 S. Ct. 1031, where we said: 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.' "

In the concurring opinion in **Screws** by Mr. Justice Rutledge in 162 ALR at p. 1356, he wrote in speaking of Section 20 which is now codified as 18 U. S. C., § 242:

"Section 20 strikes only at abuse of official functions by state officers. It does not reach out for crimes done by men in general. Not murder per se, but murder by state officers in the course of official conduct and done with the aid of state power, is outlawed."

Thus where the plan or object of the conspiracy does not include a co-conspirator or one capable of violating § 242, an agreement of two private individuals to commit such offense, is not an unlawful conspiracy under § 371. The plan could only succeed and the substantive offense could only occur, through the guilt of one capable of violating § 242.

Count One of the indictment under which petitioners were convicted, charged that Lester and Buccieri conspired with the Newport police officer Ciafardini and others to have the police officers, "while acting in their official capacity . . . wilfully deprive George Ratterman . . . of the right to be free from arrest by an officer acting arbitrarily and without legal justification of cause" and further that the plan of the conspiracy was to have Ciafardini and the other officers arrest Ratterman, charge him with a violation of law and cause his conviction, "all knowing him to be innocent."

There is not a hint in Count One of the indictment that Petitioners were charged as private persons with conspiracy to cause innocent police officers to act under color of law to deprive Ratterman of his civil rights. The Government offered no evidence to this effect nor was such a charge submitted to the jury.

The majority opinion of the Court of Appeals and the Government's present position in changing the charge of the indictment falls far short of the established requirement that an indictment must specify the elements of the offense intended to be charged and apprise the defendant of the case that he must be prepared to meet. Russell v. United States, 369 U. S. 749, 760, 772 and cases therein cited. The Government is not entitled to enlarge the indictment by revamping the whole theory of the prosecution and making new and additional charges against the petitioners for the first time in the course of proceedings before the Court of Appeals and this Court. Dissenting opinion of Justice Stewart joined by Justice Fortas in United States v. Fabrizio decided December 12, 1966, 35 United States Law Week, 4082-4083.

In that case Mr. Justice Stewart said:

"We long ago rejected the notion that 'it lies within the province of a court to change the charging

part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes. . . .' **Ex parte Bain,** 121 U. S. 1, 10. See **Stirone v. United States,** 361 U. S. 212; **Russell v. United States,** 369 U. S. 749, 770-771. As the Court in **Bain** observed, 'Any other doctrine would place the rights of the citizen . . . . at the mercy or control of the court or prosecuting attorney. . . .' 121 U. S. at 13."

However, had the indictment charged these Petitioners alone as private individuals with conspiracy to deprive Ratterman of his civil rights by causing innocent police officers to act under color of law to deprive him of his civil rights, they would have been charged with a non-existent Federal crime.

In Footnote 5 on p. 10 of the Government's Brief, it is said that the record of this case shows that the instructions pertaining to the element of specific intent required by this Court's decision in Screws v. United States, 325 U. S. 91, were clearly sufficient. The instructions appear at length in Appellants' Appendix in the Court below at pp 225a to 253a and examination reflects no such asserted compliance with the **Screws** case and as that opinion was understood by the Fifth Circuit in Pullen v. United States, 164 F. 2d 756. These two cases in their relation to the case at Bar are fully discussed in the Petition for Writ of Certiorari at pp. 51-55.

COMMENT ON CASES CITED IN GOVERNMENT BRIEF.

At p. 8, Footnote 4, the case of Boushea v. United States (1949-8th), 173 F. 2d 131, is cited. It appears that in this case Boushea and one Fontaine were indicted un-

der 18 U. S. C. § 80, later changed to § 287, 1001, for making or causing to be made or presenting or causing to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States . . . any claim upon or against the government of the United States, ... knowing such claim to be false, fictitious or fraudulent. The Court at p. 134 of the report states that the defendants were not mere aiders and abettors but were principals and guilty of the substantive offense. No conspiracy was alleged and the case contains no discussion of the offense of conspiracy. And, of course, under the statute in Boushea, any person whomsoever would possess capacity to violate its terms. Boushea cites United States v. Gooding, 25 U. S. 460, 12 Wheat. 460, 6 L. Ed. 693 (referred to at p. 7, Footnote 3 of Government Brief) as authority that one may be guilty who commands or procures a crime to be done. But Gooding qualifies this statement by holding that this princple applies only "if it is done", that is, there must be a completed offense. At Bar, there was no offense under 18 U. S. C. § 242 or § 2. Boushea is authority for Petitioners, not for the Government.

Nor is Cohen v. United States (1907-2nd), 157 F. 651 (incorrectly cited by the Government in Footnote 4 at p. 8 of Brief as being reported in 157 F. 2d 651) authority against Petitioner's contention. In Cohen, appellants were charged with conspiracy that a bankrupt corporation should conceal its assets. The corporation—the bankrupt—could violate the provisions against fraudulently concealing its assets. Since the police officers were found innocent under Counts One and Two of the indictment, neither Petitioners acting alone or with each other, could violate 18 U. S. C. § 242 or § 2, as neither possessed capacity to act under color of law.

The case of Kaufman v. United States (1914-2nd), 212 F. 613 (also incorrectly cited in Government Brief as

United States v. Kaufman, 212 F. 2d 613), does not support the Government's position. Kaufman was indicted and convicted for aiding and abetting the Daisy Shirt Company, a bankrupt, in concealing its assets from the Trustee in Bankruptcy. The bankrupt company possessed the capacity to violate the statute as held in Cohen v. United States, supra, hence any person whomsoever could aid and abet such concealment. There was no charge of conspiracy. Kaufman is an aiding and abetting case only. The completed crime was shown to have been committed. At Bar no substantive offense was committed and Petitioners have been acquitted under both 18 U. S. C., § 242 and § 2. Petitioners as private individuals, acting without the police were incapable of violating § 242 or § 2.

Again at p. 8, Footnote 4 of Government Brief the case of United States v. Selph, 82 F. Supp. 56 (S. D. Cal.), is cited. This case detefmines only the sufficiency of the indictment. The indictment was under 38 U. S. C., § 697 and § 715, and alleged that the sole defendant did "knowingly cause to be made and did knowingly aid, assist, and procure the making and presentation of a false and fraudulent certificate and paper concerning a claim for benefits under the Service Men's Readjudgment Act of 1944, 38 U. S. C., § 694, et seq." Under 18 U. S. C., § 2, the prosecution charged the direct commission of the offense and sustained it by proof of aiding and abetting. Here again there is not even a hint of a conspiracy. Selph was the only person indicted, tried and convicted. Here also the false report of prices paid for homes was made which established the completed offense which Selph was indicted for aiding and abetting.

In citing 1 Wharton, **Criminal Law and Procedure** (1957), § 106, pp. 230-231, Petitioners assume that the Government relies upon the statement in the text that:

"The principal in the first degree actually commits the crime, either by his own hand or by the hand of an innocent agent."

Petitioners have no quarrel with this text. But it of necessity assumes that a completed crime has been committed either by the hand of the principal or his agent, whether the agent be innocent or otherwise. But in the case at Bar, no offense under U. S. C., § 242 or § 2 has been committed.

The text of 1 Chitty, **Criminal Law** (5th ed., 1847), p. 256a, as in Wharton, in stating the criminal responsibility of one who commits a crime through an agent, presupposes the commission of the crime, the completed offense. The Government's theory ignores the essential elements necessary to violate § 242; that is, a wilful act under color of law, and presupposes a violation of § 242 when the record shows the contrary.

On p. 8 of the Government's Brief, the case of United States v. Inciso, 292 F. 2d 374 is cited. Inciso is not a conspiracy case. The appellant there was convicted of the substantive offense denounced by 29 U. S. C., § 186 (b), and 18 U. S. C., § 2 (b). By reason of the operation of 18 U. S. C., § 2 (b), he was convicted as a principal for violation of 29 U. S. C., § 186 (b), the substantive charge. There is not even a hint in the case of any conspiracy. Inciso alone was convicted. The principal distinction between Inciso and the case at Bar is that in the former it was established that the labor union represented by Inciso actually unlawfully received money from the employer thereby establishing the completed offense denounced by the statute. No such situation is presented by the record in the case at Bar.

CONCLUSION.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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December 20, 1966.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 666.

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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INDEX.

	Page
Statement	2
Questions Presented	2
Argument	3
Conclusion	24

Authorities Cited.

Bell v. Texas No. 69 (January 23, 1967), 35 United States Law Week 4164 21

Eckert v. United States (1951, 8th Cir.), 188 F. 2d 336, 26 A. L. R. (2nd) 752 14

Kotteakos v. United States (1946), 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 20

Lee v. United States (October 20, 1966), 368 F. 2d 834 10

Little v. United States (1937, 8th Cir.), 93 F. 2d 401 14

Lovely v. United States (1948, C. A. 4th Cir.), 169 F. 2d 386 21

Manley v. United States (1956, 6th Cir.), 238 F. 2d 221 ..... 13, 14

Michelson v. United States (1948, Ky.), 335 U. S. 469, 69 S. Ct. 213, 193 L. Ed. 168 ..... 11, 21

Nichols v. Commonwealth (1955), Ky., 283 S. W. 2d 184 12

Pullen v. United States (1947, 5th Cir.), 164 F. 2d 756 22

Sang Soon Sur v. United States (1948, 9th Cir.), 167 F. 2d 431 15

Screws v. United States (1944), 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330 22

Shirley v. Commonwealth (1964), Ky., 378 S. W. 2d 816 12
Spencer v. Texas No. 68 (January 23, 1967), 35 United States Law Week 4164 21
United States v. Fay (1927, Dist. Ct. D. Idaho, S. D.), 19 F. 2d 620 12
United States v. C. L. Guild Construction Co. (1961), 193 F. Supp. 268 20
United States v. Guest (March 28, 1966), 383 U. S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 .....22, 23
United States v. Harris (1964, 4th Cir.), 331 F. 2d 185 11
United States v. Pennix (1963, 4th Cir.), 313 F. 2d 524 .....12, 13
United States v. Price (March 28, 1966), 383 U. S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152 .....22, 23
United States v. Provoo (1954, 2nd Cir.), 215 F. 2d 531 16
United States v. Tomaiolo (1957, 2nd Cir.), 249 F. 2d 683 .....16, 19
United States v. Walker, 313 F. 2d 236 11

Miscellaneous.

18 U. S. C., § 371 13
18 U. S. C., § 242 .....2, 13, 22
Harvard Law Review, Volume 80 November 1966, No. 1 22
McCormick, Evidence, § 157 (1954) 21
Rule 26, Federal Rules of Criminal Procedure 12
Rule 58, Revised Rules of the Supreme Court 24
Wigmore on Evidence, 3rd Ed., § 983 19
Wigmore on Evidence, §§-193-194 (1940) 21

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CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Charles E. Lester and Edward Anthony Buccieri pray that a re-hearing be granted on their Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-styled case on July 8, 1966.

STATEMENT.

Petition for a Writ of Certiorari was denied by this Court on January 9, 1967. By order of Chief Justice Warren dated January 13, 1967, the issuance of the Order denying the Petition for a Writ of Certiorari was stayed pending the timely filing and disposition of a Petition for Re-hearing.

QUESTIONS PRESENTED.

1. The Court erred in permitting, over objection of petitioner, Lester, the interrogation of him by counsel for the Government of a reprimand by a court of petitioner which occurred thirty years before date of trial, which was highly prejudicial to the rights of petitioner, and was reversible error.

2. Petitioners' substantial rights were prejudiced through the fatal error of the trial court in not properly instructing the jury on the question of the wilfulness necessary to be proven in connection with the offense denounced by § 242, Title 18, U. S. C.

ARGUMENT.

The Court erred in permitting, over objection of petitioner, Lester, the interrogation of him by counsel for the government of a reprimand by a court of petitioner which occurred thirty years ago.

Over the objection of Petitioner, Charles E. Lester, the trial court permitted Government counsel during his cross-examination of Petitioner, Lester, to attack his character. The questions propounded on such cross-examination concerned a reprimand that Lester had received from a Circuit Court Judge some thirty years prior to the trial of the case. Petitioner, Lester, had not offered proof of his general character nor did he at any time do so during the trial of the case.

This error was assigned in Petitioner, Lester's, motion and grounds for a new trial, Item 13 Appellants' Appendix, page 23a, and is a substantial ground available to Petitioner although not previously presented to this Court or to the Circuit Court of Appeals as provided in Rule 58 of the Revised Rules of the Supreme Court of the United States.

Petitioner's testimony in respect to his occupation and admissions to practice law appears at Appellants' Appendix, pp. 170a-171a as follows:

"Q. What is your occupation, Mr. Lester?

A. I'm a lawyer.

Q. How long have you practiced law?

A. I was admitted to practice by examination in Kentucky, in 1926, and in Ohio, in 1927, and I have been practicing continuously since that time.

2985 Q. In which courts do you practice, Mr. Lester?

A. In the several courts of the Commonwealth of Kentucky. I don't mean in all 120 counties, but

in this general area and the courts of Southern Ohio, and the United States District Court, where we now sit, the United States District Court for the Western District of Kentucky at Louisville, the United States District Court for the Southern District of Ohio, principally in the Western Division, in Cincinnati, and Columbus, and in the United States Court of Appeals for the Sixth Circuit, that sits for Michigan, Ohio, Kentucky and Tennessee, with headquarters in Cincinnati. I am admitted to practice before the Post Office Department, the Veterans Administration, Tax Court of the United States, Interstate Commerce Commission, I've had some practice before the Internal Revenue Service and before the Supreme Court of the United States."

Petitioner Lester had not when he so testified and did not throughout this trial offer evidence respecting his character.

Over the strenuous and repeated objections of counsel for petitioner the trial court permitted the Government to attack the character of Lester as same is reflected by the record of Appellants' Appendix at pp. 197a-201a.

"**Cross-Examination**, by Mr. Joseph Cory, Special Counsel, Department of Justice.

The Court: Had you concluded, gentlemen?

Mr. Davies: Yes, Your Honor.

3028 The Court: No other questions from any of you? You may cross-examine.

Q. Did you say, Mr. Lester, that you have been in continuous practice since 1927?

A. Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the court, in the presence but out of the hearing of the jury:)

Mr. Goldfarb: Your Honor, last year we didn't bring this out. Now, we have authority for the idea that the federal court rule is you can bring in a disbarment proceeding to attack credibility. Now, we didn't do it last year because we didn't want to take the chance of possibly——

The Court: What is your authority on it?

Mr. Goldfarb: It is in 1963 April, Kansas Law Review, this man Warfield writes on federal practice. There is an article on impeaching a witness but anyway, I don't want to go into it now for that purpose. Anyhow, this man has misstated his position at the bar and I think this is just for contradicting his statement and it certainly should be allowed in.

3029 Mr. Walker: Let's find out, was he disbarred?

Mr. Goldfarb: Well, we have the world's leading expert on it right here.

Mr. Walker: Was he? He was not. He was not.

Mr. Goldfarb: The way I understand it, stop me if I am wrong, he was disbarred on seven grounds. It went up to the Court of Appeals and an affidavit of prejudice was filed, which under the Kentucky law, I am informed, automatically disqualifies an attorney. The counts were substantially sustained. The judge, I believe, sustained three or four of the seven counts and censored Mr. Lester and stated that the reason for doing it was since there had been a two or three year period where this man had been undergoing punishment, he didn't want to add——

Mr. Walker: He was never disbarred.

Mr. Goldfarb: There was a time he was disbarred, when he didn't practice.

Mr. Walker: No, he——

The Court: When was all this?

Mr. Davies: In 1928 or the early Thirties. I
3030 happened to be the Commonwealth Attorney, because Mr. Diskin was ill. Now, it didn't go

to the Court of Appeals twice. It was reversed on the grounds that Judge Caldwell should have disqualified himself.

The Court: Well, let's get back to the proposition——

Mr. Davies: Then it was assigned to Judge Newell, who ordered the reprimand. I don't know on what basis. My recollection is on three of the charges.

Mr. Walker: Reprimands aren't disbarment.

The Court: No, no, I don't think you should bring in a disbarment proceeding that was not sustained. Now, if you have some actual—you may ask him if he got a reprimand from the Court of Appeals, or from the court, you may ask him that. I will permit that, but I am not going to have it appear here that he was just before the court on a disbarment proceeding, because he is not answerable for disbarment if it was not a successful effort to get him disbarred.

Mr. Goldfarb: All right, we will confine ourselves to that.

Mr. Cory: I want to ask if there was a period during which he could not practice law.

3031 The Court: Was there a period?

Mr. Davies: No, the answer was that he superseded the judgment, but there was quite some question about whether it was a self-executing judgment or whether it wasn't or whether there was a right to supersede it, but nobody pressed it, so that during the appeal he was permitted to practice law.

The Court: Well, now, here's my ruling on this. I don't want even the word disbarment mentioned because it is unfair to this defendant. If there is something in the nature of a reprimand which was a matter of record, a matter of fact, you may inquire of it. He has testified as to his professional erudition and you have a right to attack it if you can, but not just

that there was a proceeding at the bar. Do you understand?

Mr. Goldfarb: Yes.

The Court: I think you can hold yourself within the bounds of the rules of evidence. You have a right to ask him about facts but not about something that did not materialize.

Mr. Cory: I will ask the question in the form that you suggested.

3032 Mr. Walker: Of course, if the Court please, I object to anything being asked about that. Now, for what purpose is it? To affect his credibility? Is it to show that his integrity is bad?

Mr. Goldfarb: Yes.

Mr. Walker: Is it attacking his reputation? Could it be an attack upon his character?

The Court: He has testified—I am not permitting that—it is a rebuttal of his testimony as to his professional erudition and he has a right to—if there is something affecting that, he has a right to do it, he has a right to ask about it, if it is something that is established, not something that was attempted that didn't succeed.

Mr. Walker: I don't know if I ever talked to Mr. Lester about it. May I ask him that, if he was reprimanded, so I may know?

The Court: Yes, you may in private.

Mr. Walker: May I take him back here and ask him that?

The Court: Sure, sure.

(Reporter's note: There was a pause in the proceedings while Mr. Walker and Mr. Lester retired from the court room. They returned into the court room. Mr. Lester returned to the bench and the following occurred there:)

3033 Mr. Walker: Now, if the Court please, I think I have it straight. I believe I have. This oc-

curred some 30 years ago. He said he was reprimanded by the court and gives some explanation for it. This was something that occurred at least 30 years ago and, of course, I object to any reference being made to it. It is too remote and has no relationship to this proceeding whatsoever or to him at this moment.

The Court: I am going to permit you to ask those questions under that limitation and I don't want you to use the word disbarment and I don't want you to ask anything that has not been consummated. Do you understand that?

Mr. Cory: Yes, sir.

The Court: And he may offer any explanation that he wants to give.

(Thereupon the Colloquy at the Bench Ended.)

The Court: Proceed with your examination, Mr. Cory.

Q. In your 35 years of practice of law, have you ever been reprimanded by the Circuit Court?

Mr. Walker: Now, I want to enter my formal objection.

3034 The Court: Overruled.

A. Yes. Thirty years ago I was.

Q. Will you explain what that was for?

A. For——

Mr. Walker: Object to that.

A. ——imprudence——

The Court: Overruled.

A. Imprudence in talking too much.

Q. Was that termed 'non-professional conduct'?

Mr. Walker: Object.

The Court: Overruled.

A. I don't think it was so considered, because in that proceeding, among other things, Judge Newell of Maysville said, 'To permit this proceeding to continue for another hour would be to tear down the

> temple of justice itself. The respondent'—meaning me—'Lester, is dismissed hence without day.' That's in the exact language of Judge Newell's opinion. He said, 'This prosecution is a political reprisal.' ".

As appears from the Appendix at p. 200a, the Government was permitted to put the question, "In your 35 years of practice of law, have you ever been reprimanded by the Circuit Court?" to which objection was made, overruled, and the answer given, "Yes. Thirty years ago I was." followed by the Government's question, "Will you explain what that was for?" to which objection was made and overruled and answer made, "Imprudence in talking too much," followed by the Government's question, "Was that termed 'non-professional conduct'?" to which objection was made and overruled and answer made, "I don't think it was so considered. . . ."

The only purpose of the Government in injecting this wholly irrelevant matter of a reprimand of petitioner as an attorney by a Circuit Court some thirty years before the date of trial was to discredit petitioner before the jury by attempting to impeach him by inadmissible evidence which petitioner never denied.

It appears from Appellants' Appendix at p. 199a that the trial court assigned for his reason for permitting the inquiry and requiring the answer was that the Government should be permitted to refute petitioner's claim of erudition. The trial court there said:

> "If there is something in the nature of a reprimand which was a matter of record, a matter of fact, you may inquire of it. He has testified as to his professional **erudition** and you have a right to attack it if you can, but not just that there was a proceeding at the bar."

Petitioner did not testify to his professional erudition. His testimony in this respect was only that he had been

admitted to practice law and the Court in which he had practiced. Merely stating that one has been admitted to the practice of the law and listing the courts and agencies before which that profession is practiced is a far call from a dissertation upon erudition of petitioner, even assuming he possesses such.

This question about a reprimand by a Circuit Court was not about a conviction of a prior crime. It had no relationship to the issues or to the matters for which he was on trial. It was for an occurrence not closely similar to the one on trial; and was for an occurrence many years past—some thirty years before.

It was grossly improper for the Court to permit the prosecutor to ask this question, and the Government had no support for such question. To refute his professional erudition would have no bearing on whether he had been in the continuous practice of law and the Government's question which followed, "Was it for non-professional conduct'?", Appellants' Appendix, p. 210a, shows beyond any shadow of a doubt that the Government wanted to show a prior wrongful act that occurred thirty years before and was for the sole purpose of attacking his character and to place him in bad odor with the jury.

At one point Government counsel admitted on page 199a of Appellants' Appendix that the question was to affect Lester's credibility by showing his integrity was bad.

Such practice upon the part of the Government which was permitted to occur here has but recently been condemned by the United States Court of Appeals for the District of Columbia in Lee v. United States, October 20, 1966, 368 F. 2d 834 at pp. 836-837. There the Court said at p. 837:

> "Long before **Walder** and **Tate**, the rules of evidence observed in this jurisdiction, as elsewhere, did not countenance the impeachment of witnesses by

otherwise inadmissible evidence directed to collateral issues. The policies served by these rules (i. e., the prevention of confusion and surprise) have peculiar force where the attempt is to discredit by means of purported misconduct short of a conviction. And, these traditional policies aside, there is something inherently repugnant about adducing evidence of alleged crimes from which appellant has already been given judicial deliverance, and which appellant, in or out of court, has never failed to deny."

The trial court permitted the Government to assault petitioner's general character although the legal principle is well established that in a criminal case the defendant's general character cannot be attacked by the Government unless evidence of his good character is first introduced by him. United States v. Harris, 1964, 4th Circuit, 331 F. 2d 185. Permitting the introduction of such evidence is reversible error as held in **Harris** which cites as its authority the Sixth Circuit 1963 case of United States v. Walker, 313 F. 2d 236, 238.

Both the **Walker** and **Harris** cases rely upon the decision of the Supreme Court of the United States in Michelson v. United States, 335 U. S. 469, 477, 69 S. Ct. 213, 219, 193 L. Ed. 168 (1948).

To compound the error the Court as appears at Appellants' Appendix at p. 234a charged the jury as follows:

"Now, there have been offered in this case—there were I believe one or two instances in which a **reference was made to the character of one of the defendants.** You are not to accept that as substantive evidence. It may be considered by you in determining whether or not you believe the guilt has been established to the exclusion of a reasonable doubt, but the evidence was given by witnesses, a witness or witnesses who have—don't presume to know anything

about the facts of the case, merely expressed an opinion."

In the case of Nichols v. Commonwealth, Ky. (1955), 283 S. W. 2d 184, 187, it was stated:

> ". . . It is the law of this jurisdiction that the Commonwealth may show for the purpose of attacking the credibility of a witness that he has been convicted of a felony and this, together with the punishment he received, may be brought out either by a court record or by the witness himself. White v. Commonwealth, 312 Ky. 543, 228 S. W. 2d 426; Bates v. Commonwealth, 260 Ky. 551, 86 S. W. 2d 322; Quillen v. Commonwealth, 275 Ky. 158, 120 S. W. 2d 1047. This rule applies as well to the accused as to an ordinary witness. Bolin v. Commonwealth, 206 Ky. 608, 268 S. W. 306; White v. Commonwealth, supra. CR 43.07, which is also applicable to criminal cases, provides the basis for the principle just stated."

To the same effect see Shirley v. Commonwealth, Ky. (1964), 378 S. W. 2d 816.

This rule of Kentucky law should be applied in a Federal Court sitting in Kentucky. United States v. Fay, 19 F. 2d 620 (1927). Rule 26, Fed. R. Crim. P. In United States v. Pennix, 313 F. 2d 524, 531 (1963, 4th), the Court used this language in respect to the attempted impeachment of a witness:

> ". . . In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude. By the prosecutor's one deft phrase, '30 times,' the jurors were informed that the defendant, whose credibility they must determine, had been arrested 30 times, perhaps more. This cross-examination could have had no pur-

> pose other than to degrade the defendant and to arouse the prejudices of the jurors against him."

The conviction in **Pennix** was reversed for the error of the trial court in permitting the improper cross-examination of defendant.

As the record of the instant case reflects, petitioners were along with all others accused of conspiracy and of the substantive offense of 18 U. S. C., § 242, and, as the Court of Appeals held, there is an inconsistency between the verdicts convicting petitioners of a conspiracy under § 371 and their acquittal of the substantive offense. The admission of this inadmissible evidence could well have been the sole reason and determining factor for petitioner's conviction and prevented him from having a fair and impartial trial.

In writing of a similar situation the Court of Appeals for the Sixth Circuit in 1956 in the case of Manley v. United States, 238 F. 2d 221, said:

> "Upon the entire record in the case, the acquittal on count four was inconsistent with conviction on counts two and three. This alone would not justify reversal. But, when an obviously inconsistent verdict as to different counts of an indictment or information is returned by the jury, but the trial court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

In **Manley**, the defendant had been indicted for post office offenses under Title 18, § 1001 and § 1711. He was convicted under § 1001 and acquitted under § 1711, which latter count charged him with converting to his own use $2,959.42, the property of the United States. Over objection of defendant he was required to answer that he had been discharged from his previous employment with Coca Cola Company because "I was short in my account."

The **Manley** case was reversed for a new trial upon the sole ground of the inadmissibility of such evidence on cross-examination to impeach the defendant as a witness.

The **Manley** case in the Sixth Circuit adopts the view of the Eighth Circuit that acts of misconduct not resulting in conviction of a crime are not the proper subject of cross-examination of a defendant as a witness, citing Little v. United States, 93 F. 2d 401, 408, and Eckert v. United States, 188 F. 2d 336, 26 ALR 2d 752. In the **Eckert** case the Government was permitted over the objection of the defendant to inquire of the accused whether he had been previously arrested on a Mann Act charge and upon his denial the Government was permitted to call a Government agent to testify that defendant had told him, the Government agent, that he had been so arrested. This was held to be error prejudicial to the substantial right of Eckert to a fair trial and his conviction was reversed. It also appears in the **Eckert** case that his co-defendant and wife, Margaret Eckert, was over the repeated objections of her counsel required by the Court to answer on cross-examination inquiries of Government counsel concerning her prior marriages and divorces. Such improper cross-examination was held reversible error, the Court there stating:

> "Obviously this cross-examination was for the purpose of discrediting the appellant Margaret Echert. It was not proper cross-examination, and the objections to it should have been sustained. See Gideon v. United States, 8 Cir., 52 F. 2d 427; Allen v. United States, 9 Cir., 115 F. 3, 11; Simon v. United States, 4 Cir., 123 F. 2d 80, certiorari denied 314 U. S. 694, 62 S. Ct. 412, 86 L. Ed. 555.
>
> Neither of the Echerts was on trial for matters complained of on cross-examination. Ben-
> Headnote 5 jamin was not being tried for the acts for which he was arrested in 1947, and

Margaret was not on trial because she had been divorced from two former husbands. It is an established rule that 'Acts of misconduct, not resulting in conviction of a crime, are not the proper subject of cross-examination to impeach a witness.' Lennon v. United States, 8 Cir., 20 F. 2d 490, 494; Little v. United States, 8 Cir., 93 F. 2d 401; Simon v. United States, supra, 123 F. 2d at page 85."

In the case of Sang Soon Sur v. United States, 167 F. 2d 431, 1948, the conviction of defendant for income tax evasion was reversed upon the sole ground that the trial court over the objection of defendant had permitted his character to be attacked when the defendant had not put it in issue. There the Court said:

"The admission of the evidence of independent crimes was error. Its admission cannot be justified under any of the exceptions to the general rule. We fail to perceive any relevancy between an evasion of the payment of income taxes and a conviction for the possession of opium. Such an error must have resulted in prejudice to appellant, more so perhaps, because of his nationality and alien status.

Appellant entered the trial with a presumption of good reputation. He did not put his reputation in issue. Crawford v. United States, 59 App. D. C. 356, 41 F. 2d 979. The introduction of evidence of the commission of independent crimes through the medium of the statement or confession cannot be justified on the ground that the relevant portions thereof could not be segregated from the irrelevant. Such a segregation could easily have been made without impairing the force and value of the statement relative to the income tax evasion. Here the effect of the challenged evidence could have had no other effect than to divert the minds of the jurors from the real issue and we are unable to say that it was not a de-

termining factor in the minds of the jurors in reaching their verdict of guilty. As was said in the case of United States v. Dressler, 7 Cir., 112 F. 2d 972, 977: '* * * it is inconsistent with our traditional conception of a fair trial to permit any information to go to a jury which might influence a jury to convict a defendant for any reason other than he is guilty of the specific offense with which he is charged'."

To the same effect see the cases of United States v. Provoo, 215 F. 2d 531 (1954-2nd) and United States v. Tomaiolo, 249 F. 2d 683 (1957-2nd), where the convictions of the defendants were reversed upon the ground that the trial court had permitted their character to be attacked when the defendants had not put it in issue. In the **Provoo** case the Court said at pp. 536-537:

"It is true that a defendant who takes the stand subjects himself to cross-examination, within the limits of the appropriate rules of evidence, like any other witness, and may be cross-examined for the purpose of impeaching his credibility. In People v. Sorge, 301 N. Y. 198 at page 200, 93 N. E. 2d 637, it is stated that a defendant, like any other witness, may be interrogated upon cross-examination in regard to any vicious or criminal act of his life that has a bearing on his credibility. Whether this is a correct statement of the New York law we need not stop to consider. Concededly local rules of evidence are not controlling in criminal trials in the United States courts. Rule 26, F. R. Cr. P., 18 U. S. C. A. In the Federal courts there has been an impressive unanimity of view on the point before us. As generally held, specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes. In this circuit, apparently under the influence of the broader

New York rule, we have at times allowed impeaching questions as to misdemeanors, United States v. Cohen, 2 Cir., 177 F. 2d 523, 525, certiorari denied 339 U. S. 914, 70 S. Ct. 568, 94 L. Ed. 1340; United States v. Minkoff, 2 Cir., 137 F. 2d 402, 405; disbarment, United States v. Rubenstein, 2 Cir., 151 F. 2d 915, certiorari denied 326 U. S. 766, 66 S. Ct. 168, 90 L. Ed. 462, and even criminal acts which were not established by a judgment of conviction. United States v. Schiller, 2 Cir., 187 F. 2d 572; United States v. Gruber, 2 Cir., 123 F. 2d 307; United States v. Buckner, 2 Cir., 108 F. 2d 921, certiorari denied, 309 U. S. 669, 60 S. Ct. 613, 84 L. Ed. 1016; United States v. Frankel, 2 Cir., 65 F. 2d 285. Of these last, however, one may be explained as tending to show the necessary criminal intent, United States v. Schiller, see concurring opinion of Frank, J., 187 F. 2d at page 576, and two as proceeding on the theory that the door had been opened, United States v. Gruber, United States v. Buckner. Moreover, only two of the cases, United States v. Schiller and United States v. Cohen, were decided after the promulgation of the Federal Rules of Criminal Procedure had lessened the desirability of following New York decisions. Of these, Schiller, as noted, is explicable on other grounds, and Cohen (where this point received cursory treatment) involves no clear conflict with the majority rule. On the strength of this meager authority we cannot say that we are committed to a position so radically at variance with that of the other circuits as to allow this examination.

Even if the course of our precedents was clearer, we would have difficulty espousing the Government's position. Under F. R. Cr. P. 26 we are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' In proposing the rule, the

Notes of the Advisory Committee remark that: 'Since all federal crimes are statutory and all criminal prosecutions in the federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.' We have set forth above the interpretation of the common law adopted by the overwhelming majority of federal courts. As for experience, Wigmore, Evidence (3d ed.), §§ 980 (a)-983 presents numerous examples of the abuses resulting from unrestrained inquiry into a witness's history, suggests that the inquiry be confined to the trait of veracity, § 982 (1), and offers the suggestion that a defendant-witness is entitled to even greater protection, in order to prevent unfair prejudice. §§ 891 (3), 983 (4), 2277 (4). As for reason, we do not conceive that inquiry into every accusation of criminal or vicious conduct will further the search for truth. Where, as here, the defendant's general character has not been put in issue, it is difficult to justify any examination other than into the trait of veracity. No authority has been cited which suggests that homosexuality indicates a propensity to disregard the obligation of an oath. The sole purpose and effect of this examination was to humiliate and degrade the defendant, and increase the probability that he would be convicted, not for the crime charged, but for his general unsavory character. Permitting it was error.

The error was plainly prejudicial. Indeed we can conceive of no accusation which could have been more degrading in the eyes of the jury nor more irrelevant to the issue of treason on which he was being tried. On the main appeal the judgment must be reversed and the cause remanded for a new trial. This disposi-

tion makes unnecessary consideration of the other alleged errors in the course of the trial."

And in United States v. Tomaiolo, 249 F. 2d 683, at p. 689, the Court said:

> "Nor did the defendant by testifying put his general character in issue. By taking the stand the defendant elected to be treated as any other witness, *viz.* he laid his credibility open to attack. Although a prosecutor may bring in evidence as to the truth and veracity of a defendant upon cross-examination, he is not at liberty to attack his general character. The general character of a defendant is put in issue only when he calls witnesses to testify to his reputation in general. Michelson v. United States, 1948, 335 U. S. 469, 476 et seq., 69 S. Ct. 213, 93 L. Ed. 168; Richardson, Evidence, § 154 (8th Ed. 1955 Prince). The testimony of the defendant about his parole, and the circumstances thereof, did not 'open the door' for the prosecutor's questions. United States v. Provoo, supra, 215 F. 2d at page 535."

Such cross-examination permitted by the Court in this case has been in Wigmore on Evidence, 3rd Ed., § 983, at p. 551, characterized in this language:

> "The ordinary instincts of decency, not to say courtesy, are violated by such examinations, and every new instance makes us more sodden to the spectacle and tends to bring us towards the same level of degradation. It is the difference between the hunt and the slaughterhouse. One may well enough find sport in stalking the lion in the desert or beating the bush for the tiger, because there is a risk for the hunter which dignifies his sport, and there is a rapacity and a destructiveness in the hunted which leaves no room for sympathy; but the process of cutting the throat or knocking the head of

a sheep or an ox penned in the shambles is both safe and brutal, and is to be justified only on the ground of its absolute necessity. The hunting down of a fleeing desperado, or the ensnaring of a chief of counterfeiters by the craft of detectives, is a process which does not violate instincts of fairness or principles of justice. But the ruthless flaying of personal character in the witness-box is not only cowardly—because there is no escape for the victim—and brutal—because it inflicts the pain of public exposure of misdeeds to idle bystanders—, but it has often not the slightest justification of necessity. Severe limits must be put to such conduct."

As the Court said in United States v. C. L. Guild Construction Co. (1961 D. R. I.), 193 F. Supp. 268, at p. 272:

"Where it cannot be clearly said that a prejudicial statement or question did not have a substantial influence on the judgment of the jury, it is the duty of the Court to set aside a conviction and grant a new trial. Kotteakos v. United States, 1946, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; Mickler v. Falls, 5 Cir., 1957, 243 F. 2d 515; Nalls v. United States, 5 Cir., 1957, 240 F. 2d 707; Helton v. United States, 5 Cir., 1955, 221 F. 2d 338; Oliver v. United States, 6 Cir., 1953, 202 F. 2d 521; United States v. Levi, 7 Cir., 1949, 177 F. 2d 827; Holt v. United States, supra; Pierce v. United States, supra; Middleton v. United States, 8 Cir., 1931, 49 F. 2d 538; C. M. Spring Drug Co. v. United States, 8 Cir., 1926, 12 F. 2d 852."

In Kotteakos v. United States, supra, the Supreme Court said at pages 764-765 of 328 U. S., at page 1248 of 66 S. Ct.:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should

stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The complained of cross-examination of petitioner was, over his objection, permitted by the trial court for no purpose other than to attempt to show a criminal disposition of petitioner and such practice by the Government was a denial to him of due process of law under the Fourteenth Amendment as suggested by the Chief Justice in his dissenting opinion in Spencer v. Texas, No. 68, Bell v. Texas, No. 69, January 23, 1967, reported in 35 United States Law Week 4164 at pp. 4169-4170, citing Lovely v. United States, 169 F. 2d 386, 389 (C. A. 4th Cir., 1948), Michelson v. United States, 335 U. S. 469, McCormick, Evidence, § 157 (1954), and Wigmore, Evidence, §§ 193-194 (1940).

A reprimand by a Circuit Court for petitioner's "imprudence in talking too much" was neither a felony, nor a misdemeanor, nor a contempt; it was injected into the case for the sole purpose of attempting to degrade petitioner and could not possibly have had any probative value to show a tendency to commit the offenses laid in the indictment. It was a most unfair attack and an attempt at character assassination upon petitioner who had not and did not put his character in issue. And this is precisely what the prosecution is not allowed to show in a criminal case. See Lovely v. United States, 169 F. 2d 386, 388

(4th Cir., 1948). The rebuke or reprimand by the Circuit Court more than thirty years before the day of trial has no similarity, or connection even remotely, with the charges made in the indictment, and was highly prejudicial to the substantial rights of petitioner, Lester.

Petitioners' substantial rights were prejudiced through the fatal error of the trial court in not properly instructing the jury on the question of the wilfulness necessary to be proven in connection with the offense denounced by Section 242, Title 18, U. S. C.

This question was presented in the Petition for Writ of Certiorari, pages 51-55. However, this error complained of is so fundamental and prejudicial to the substantial rights of these petitioners that we wish to again call it to the attention of this Court. And for the further reason that the **Harvard Law Review**, Volume 80, hereinafter cited, reviewing and interpreting the **Price** and **Guest** cases was not available at the time the Petition for Writ of Certiorari was filed.

The instructions of the trial court to the jury did not comply with the law laid down by this Court in the case of Screws v. United States, 1944, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330, and as so interpreted by the case of Pullen v. United States, 1947, 164 F. 2d 756.

Nowhere in the Court's instruction was the jury told that the word "wilful" implied more than merely "a conscious purpose to do wrong" on the part of petitioners, but to convict them it was necessary for the jury to find that the petitioners had the specific purpose and intent to deprive Ratterman of a constitutional right.

In **Harvard Law Review**, Vol. 80, November 1966, No. 1, Hon. Archibald Cox, former Solicitor General of the United States, in his analysis and interpretation of the

cases of United States v. Price, March 28, 1966, 383 U. S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152, and United States v. Guest, March 28, 1966, 383 U. S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170, at pages 156-157 said:

> "These decisions resolve two areas of confusion in favor of maximum federal jurisdiction . . . The practical effect of these two extensions of federal jurisdiction may be severely limited, however, by the prerequisite to conviction under sections 241 and 242 of proof of a specific intent to interfere with the constitutional right. 13"

Note 13, page 157

> "Both statutes have been challenged as unconstitutionally vague. The Court sustained § 242 against that attack in Screws v. United States, 325 U. S. 91 (1945), focusing on the element of wilfulness required by the statute. In **Price**, the Court adopted the reasoning of four Justices in United States v. Williams, 341 U. S. 70 (1951), that a conspiracy requires similar willful conduct, so that § 241 is not unduly vague if there is an allegation of specific intent to deprive someone of the federal right involved."

Petitioners believe that the law as written in the **Screws** case has not been relaxed and that it is more than an empty meaningless opinion. Petitioners are entitled to its benefits and protection as long as it remains the law. The Court did not charge the jury as required by **Screws**, that it was not sufficient that petitioners had a generally bad purpose. The Court did not charge as Screws also requires that "To convict it was necessary for them to find that petitioners had the purpose to deprive Ratterman of his constitutional rights under the Fourteenth Amendment to the United States Constitution." We submit that petitioners' substantial rights have been violated and that they are entitled to a new trial consistent therewith.

CONCLUSION.

It is accordingly urged that upon consideration of this Petition for Rehearing, the Petition for Writ of Certiorari be granted.

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Certificate of Counsel.

J. Leonard Walker, counsel for petitioners, hereby certifies that this Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to the provisions of Rule 58, Sub-section 2, of the Revised Rules of the Supreme Court of the United States.

J. Leonard Walker,
Counsel for Petitioner, Lester,
and one of the counsel for
Petitioner, Buccieri.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 666

OCTOBER TERM, 1966.

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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CASES CITED.

Page

Henderson v. United States, 202 F. 2d 400, 406 (C. A. 6, 1953) 3

United States of America v. Benson, 369 F. 2d 569, 6th Circuit, decided December 15, 1966 ..... 1, 3

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SUPPLEMENTAL PETITION FOR REHEARING

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners respectfully request leave of this Court to file this Supplemental Petition for Rehearing for the reason that counsel for petitioners discovered in the advance sheets of the Federal Reporter dated February 6, 1967, delivered to his office February 9, 1967, that the United States Court of Appeals for the Sixth Circuit decided a case December 15, 1966, which has great bearing and appears decisive of one of the questions discussed in the Petition for Rehearing.

In the case of United States of America v. Benson, 369 F. 2d 569, 6th Circuit, decided December 15, 1966, Benson was convicted for storing a stolen automobile.

Upon cross-examination of a defense witness, Government counsel was permitted to show that some thirty years before, the witness had been convicted of a felony and served a prison sentence, and the District Attorney then proceeded to inquire whether the witness "had many other charges." Upon objection the District Judge told the jury that they were not to consider charges and announced the familiar rule: "It is convictions that may be considered by the jury in weighing this man's testimony and the convictions must involve moral turpitude."

The Government attorney then, . . . proceeded over objection to disclose that the witness had been charged, but acquitted of, "violation of age of consent" some thirty-two years before when the witness was a teenage boy.

The Court said at page 572:

> It was proper to test the witness' credibility by showing previous convictions, but we consider that the foregoing examination violated the rule which the District Judge had already announced. Such was the correct rule. In Henderson v. United States, 202 F. 2d 400, 406 (C. A. 6, 1953), we said,
>
> > "* * * the cross-examination should be limited to showing convictions for felonies or crimes involving moral turpitude."
>
> We were there dealing with cross-examination of a defendant charged with crime who had taken the stand in his own defense. But such rule applies to the cross-examination of any witness whose credibility is in issue. Rizzo v. United States, 304 F. 2d 810, 831 (C. A. 8, 1962), cert. den. 371 U. S. 890, 83 S. Ct. 188, 9 L. Ed. 2d 123; Ramirez v. United States, 294 F. 2d 277, 284 (C. A. 9, 1961); 3 Wigmore, Evidence, § 980a (3rd ed. 1940). It is true that greater liberality is indulged in the cross-examination of a character witness as to his knowledge of arrests of and

charges made against the defendant whose character is the subject of the inquiry. Accord, United States v. Gosser, 339 F. 2d 102, 112 (C. A. 6, 1964). But the freedom in this regard remains qualified as Mr. Justice Jackson noted:

> "[The] rule is sometimes confused with that which prohibits cross-examination to credibility by asking a witness whether he himself has been arrested.
>
> "Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness." Michelson v. United States, 335 U. S. 469, 482, 69 S. Ct. 213, 221, 93 L. Ed. 168, 177 (1948).

The government has neither urged nor demonstrated that the proof of appellant Benson's guilt was so overwhelming that we should overlook the examination as not affecting his substantial rights. 52 (a) F. R. Crim. P. We are, therefore, constrained to order a new trial.

In the Benson case the Court quoted with approval the case of Henderson v. United States, 202 F. 2d 400, 406 (C. A. 6, 1953).

In the **Henderson** case the defendant was convicted for violation of the mail fraud statute. The Circuit Court of Appeals held, inter alia, that evidence of existence of a scheme to defraud and use of mail pursuant thereto was sufficient for jury, but that admitting evidence pertaining to defendant's court martial record 27 years earlier was error.

The Court after disposing of certain matters of evidence stated on page 405:

A more serious question is presented by appellant's contention that the District Judge erred in permitting the Government to cross-examine him, over objection, about an Army court-martial in 1925. Government counsel brought out by this cross-examination that the appellant had gone AWOL (Absent Without Official Leave) several times during his enlistment in the Army about 1925, and had had several court-martials. On re-direct examination, appellant stated that he had been absent without leave several times, but returned voluntarily to his assignment; that he had served several short periods of time in the guard house for what he thought was AWOL; and that he served out his enlistment and received an honorable discharge. The District Judge instructed the jury that the evidence could be considered only on the question of the credibility of the witness.

It is well settled that when a defendant in a criminal trial takes the stand in his own defense he waives immunity from cross-examination, and is, like any other witness in the case, subject to impeachment as to his credibility. Banning v. United States, 6 Cir., 130 F. 2d 330, 337. It is likewise settled that for the purposes of such impeachment it is competent to show that the witness has been previously convicted of a felony. McLendon v. United States, 6 Cir., 13 F. 2d 777, 778. There is some conflict in the authorities as to whether the accused may be cross-examined as to a prior conviction of a misdemeanor, or whether such cross-examination is limited to convictions for felonies or crimes involving moral turpitude. See Annotation, 103 A. L. R. 350, 362, 365.

Rule 26, Rules of Criminal Procedure, 18 U. S. C. provides that the admissibility of evidence and the competency and privileges of witnesses in criminal trials in the federal courts shall be governed, except

when an Act of Congress or the Rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. Funk v. United States, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369; Wolfle v. United States, 291 U. S. 7, 12, 54 S. Ct. 279, 78 L. Ed. 617. At common law the inquiry was limited to felonies or crimes involving moral turpitude. Wigmore on Evidence, 3rd Ed., § 980 (2) (a), 519, 520; Campbell v. United States, 85 U. S. App. D. C. 133, 176 F. 2d 45; Keith v. State, 127 Tenn. 40, 44, 152 S. W. 1029; Coble v. State, 31 Ohio St. 100; Bartholomew v. People, 104 Ill. 601; See Nesbit v. Cumberland Contracting Co., Md., 75 A. 2d 339, 20 A. L. R. 2d 1212. We are of the opinion that the cross-examination should be limited to showing convictions for felonies or crimes involving moral turpitude. Middleton v. United States, 8 Cir., 49 F. 2d 538, 540; Haussener v. United States, 8 Cir., 4 F. 884, 887; United States v. Montgomery, 3 Cir., 126 F. 2d 151, 155; Scaffidi v. United States, 1 Cir., 37 F. 2d 203, 211; Solomon v. United States, 1 Cir., 297 F. 82, 94; See Banning v. United States, supra, 6 Cir., 130 F. 2d 330, 337; Pearson v. United States, 6 Cir., 192 F. 2d 681, 699; Mitrovich v. United States, 9 Cir., 15 F. 2d 163, 164, C. A. 9th; Contra: United States v. Cohen, 2 Cir., 177 F. 2d 523, 525. Under this view of the law, it was error for the District Judge to admit the evidence pertaining to appellant's court-martial record some twenty-seven years prior thereto. People v. Flynn, 275 App. Div. 350, 89 N. Y. S. 2d 28; People v. Wilson, 400 Ill. 461, 81 N. E. 2d 211. See Grigsby v. Commonwealth, 299 Ky. 721, 187 S. W. 2d 259, 159 A. L. R. 196; Powell v. Commonwealth, 308 Ky. 467, 214 S. W. 2d 1002; People v. Levan, 295 N. Y. 26, 64 N. E. 2d 341.

Petitioners sincerely believe that due to the inconsistency of the verdicts rendered in this case and the fact that there was a hung jury in the first trial, that the permitted questions propounded upon cross-examination to petitioner, Lester, of a reprimand by a Circuit Court more than thirty years ago and of his non-professional conduct may well have been the sole reason for his conviction and was highly prejudicial to his substantial rights and requires a reversal of this case for a new trial.

CONCLUSION.

It is accordingly urged that upon consideration of the Petition for Re-hearing that the Petition for Writ of Certiorari be granted.

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